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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 691

ASSOCIATED GAS DISTRIBUTORS, *Petitioners*

v.

AUSTRAL OIL COMPANY, ET AL., *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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v.

AUSTRAL OIL COMPANY, ET AL., *Respondents* [1]

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Associated Gas Distributors, consisting of public utilities engaged in the distribution of natural gas,[2] petition for a writ of certiorari to review the judgment and opinion entered by the United States Court of Appeals for the Fifth Circuit on March 19, 1970, as supplemented by the Court's opinion denying petitions for rehearing entered June 16, 1970.

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[1] A list of additional respondents is set forth in Appendix B.

[2] A list of the Petitioners, all of whom participated in proceedings before the Commission and the court below as part of a larger group also designated Associated Gas Distributors is set forth in Appendix A.

OPINIONS BELOW

The opinions of the Court of Appeals for the Fifth Circuit are not yet reported. The opinions of the court, which are lengthy, have been filed as appendices to the Petition for a Writ of Certiorari filed in No. 669, October Term 1970, *Municipal Distributor Group v. Federal Power Commission, et al.* The opinions and orders of the Federal Power Commission that were reviewed by the Court of Appeals are reported at 40 FPC 530 (1968) and 41 FPC 301 (1969).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on March 19, 1970. A timely petition for rehearing was denied on June 16, 1970, and this petition for certiorari is filed within 90 days of that date. The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether a reviewing court acting pursuant to § 19-(b) of the Natural Gas Act may affirm a rate order of the Federal Power Commission, and at the same time exercise general equity powers to authorize the Commission to make retrospective adjustments in the rates fixed by such order.

STATUTE INVOLVED

The statutory provision involved is Section 19(b) of the Natural Gas Act, 52 Stat. 821 (1938), as amended, 15 U.S.C. § 717r(b). The language of this Section is as follows:

> (b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commis-

sion in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which

if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 346 and 347 of title 28.

STATEMENT OF THE CASE

This case, in terms of the number of parties, quantity of gas and consumer dollar interest involved, is the largest ever decided by the Federal Power Commission (FPC) under the Natural Gas Act. In it the FPC applied to the Southern Louisiana production area the same regulatory principles and methods approved by this Court in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968). It fixed rates under Sections 4 and 5 of the Natural Gas Act and ordered sizable rate reductions and refunds from producers in Southern Louisiana. The order resolved long-standing rate controversies by determining, for the first time, just and reasonable rates for gas produced in this important production area. It is unnecessary to detail the nearly ten-year history of the case before the FPC, except to say that it closely paralleled the proceeding and orders affirmed by this Court in the *Permian Cases*.[3]

The history of the present case which is relevant to this Petition begins with the appeal of the FPC's orders to the Fifth Circuit in the spring of 1969 by a

[3] A comprehensive statement of the case is set forth in the petition filed by the Municipal Distributor Group in No. 669 and, to avoid repetition, we have limited our statement.

large group of producers, who contended that the rates fixed and numerous other provisions were too stringent. Similarly, appeals were taken by the Public Service Commission of the State of New York and a group of municipal distributors on the ground that the rates fixed by the FPC's orders were too high. Petitioners here, all of whom are gas distribution companies, intervened and joined the FPC in supporting its orders (which the FPC below characterized as "long overdue", 41 FPC at 308) taking the view that fourteen years of rate litigation were sufficient, and that the orders were reasonable and would provide much needed rate certainty.

On March 19, 1970 the Fifth Circuit affirmed the FPC in full. Taking notice of producers' arguments dealing with gas supply, the court however indicated that the FPC in the new *Southern Louisiana* area rate proceeding now pending before it (in Docket No. AR69-1) should pay special attention to the supply situation. The producers petitioned for rehearing and requested that the court remand the case for the taking of further evidence on the supply issue, arguing (in the court's words) that affirmance "would preclude the Commission from reexamining revenues from gas that has already been delivered."

In May the Fifth Circuit below directed the FPC to respond to these petitions and to answer two questions. The first was "whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed . . . if circumstances appearing since the entry of the order seem to make these actions advisable." The FPC answered that it has authority to modify its order, but only prospectively from the date of a subsequent FPC

order. It correctly stated that it has no retroactive ratemaking powers.

The Fifth Circuit also asked "whether this Court may, in the exercise of its equitable powers, affirm an Order of the Commission while preserving the authority of the Federal Power Commission to stay, modify, or rescind the Order if the circumstances seem to make these actions advisable." The FPC responded that, in the language of Section 19(b) of the Natural Gas Act, the court has the power "to affirm, modify or set aside such order in whole or in part" and that, on motions to adduce additional evidence, the court might direct the FPC to hold further hearings and make further fact findings. The FPC declined to comment on any equitable powers the court might have.

Finally, at the close of this response, without explanation, the FPC requested the Fifth Circuit to remand the case, with two commissioners dissenting.

On the basis of the petitions for rehearing and the response of the FPC, which were opposed by Petitioners, the Fifth Circuit on June 16, 1970 issued a per curiam opinion on rehearing, reaffirming its original opinion but at the same time authorizing the FPC to reopen any part of the rate order which the court was affirming.

Thus this case presents a crucial question as to whether a court of appeals can (1) affirm an order reached after a decade-long rate proceeding of the FPC, and (2) simultaneously allow the FPC to reopen that entire decade of litigation by authorizing it to "make retrospective as well as prospective adjustments in this case. . . ."

REASONS FOR GRANTING THE WRIT

1. The Decision on Rehearing Below Presents Serious Obstacles to Effective Regulation Under the Natural Gas Act

This Court held in its *First Phillips* decision[4] that producers of natural gas are "natural gas companies" within the meaning of the Natural Gas Act and subject to regulation thereunder. As such, their rates must be just and reasonable. The purpose of the Natural Gas Act, as stated in this Court's *CATCO* decision,[5] is to afford the consumer a complete, permanent and effective bond of protection from excessive rates and charges. The effect of the opinion on rehearing below is to prolong indefinitely the long overdue efforts to obtain effective regulation for the highly important Southern Louisiana production area[6] and to obtain a determination of just and reasonable rates for a period beginning in 1954.

The purport of this statement is best illustrated by the example of the very gas sales involved in the *CATCO* case which were reviewed by this Court. The contracts covering the *CATCO* sales were first entered into in 1956 and gas began to flow in 1958. These very sales, along with a great many others, were the subject of the FPC orders reviewed by the Fifth Circuit. Had the Fifth Circuit given its judgment of affirmance the finality which is required by Section 19(b) of the Natural Gas Act, the just and reasonable rates for the *CATCO* sales and numerous others (some dating as far back as 1954 and *First Phillips*) would at last have

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[4] *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

[5] *Atlantic Refining Co.* v. *Public Service Comm'n.*, 360 U.S. 378 (1959).

[6] Southern Louisiana presently provides one-third of the nation's gas production.

been determined, at least as to periods of time prior to the FPC order. However, as the opinion of the court below now stands, the FPC is given the discretion, irrespective of the court's affirmance and findings of reasonableness, to reopen the rates of the past sixteen years in Southern Louisiana and to reconsider them. Whether, after such further administrative proceedings (unlimited by any judicial guidance) the FPC reaffirms its present order, or raises or lowers it, is immaterial. The delay alone would deprive consumers of the protection to which they are entitled under the Natural Gas Act,[7] and the uncertainty created by such delay would be harmful to all segments of the natural gas industry that are required to function under the regulatory system prescribed by that Act.

2. The Opinion of the Fifth Circuit Affirming a Rate Order of the FPC and at the Same Time Authorizing It To Reopen Any Part of Its Order Presents Important Questions of Federal Law and Is in Conflict With Prior Decisions of This Court and Other Circuits

The opinions of the Fifth Circuit raise important questions concerning the statutory authority of the Federal Power Commission, as well as the power of a reviewing court to expand that authority of the Commission. Effective regulation of the natural gas industry requires resolution of these issues by this Court.

For the first time in the history of the Natural Gas Act a court of appeals, by both affirming the FPC and stating that the FPC could "reopen *any* part of its order" in effect authorized retroactive ratemaking.

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[7] This Court has recognized that refunds, while sometimes the consumer's only protection, are not adequate in and of themselves. *FPC* v. *Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962).

There is no provision in the Natural Gas Act which empowers the FPC to make retroactive rate determinations. This Court has unequivocally declared that the FPC is empowered to establish rates prospectively only. In *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944), the Court ruled the ". . . power to fix rates is limited to those 'to be thereafter observed and in force'." *Id.* at 618. The Court has recently reaffirmed this ruling in *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968).

Since the authority of the FPC is entirely statutory, the powers withheld by Congress cannot be conferred upon the agency by courts through their equitable powers. In *Public Service Comm'n. of N. Y.* v. *FPC*, 257 F.2d 717 (CA 3 Cir. 1958), the Court of Appeals wrote that the Commission ". . . acts as an arm of Congress and only as Congress has directed it." Thus in *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951), this Court noted that it lacked jurisdiction to award reparation or equity powers authorizing the agency to award reparations. The Court held that there was ". . . no case where the court has ordered reference of an issue which the administrative body would not itself have jurisdiction to determine in a proceeding for that purpose." *Id.* at 254. In an earlier case, *FTC* v. *Raladam Co.*, 283 U.S. 643 (1931), this Court also had ruled that courts cannot, "in the proper exercise of their judicial function," expand the agency powers beyond the scope of the statute. Therefore, in the instant case the Fifth Circuit was without authority to expand the statutory power of the FPC.

As noted, the Fifth Circuit attempted to make its judgment both a final one of affirmance of all the complex and numerous rate findings of the FPC below, and

at the same time a completely non-final judgment that gives the FPC indeterminate discretion to reopen any part of its prior rate order. Such a judgment not only contravenes the express language of Section 19(b) that a judgment "shall be final" but conflicts directly with the decision of the Eighth Circuit in *State Corp. Comm'n of Kansas* v. *FPC*, 215 F.2d 176 (1954).[8]

CONCLUSION

For the foregoing reasons it is urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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September 14, 1970

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[8] See also *Arizona Grocery Co.* v. *Atchison, Topeka & Sante Fe R. Co.*, 284 U.S. 370 (1932); *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

APPENDIX A

Associated Gas Distributors

Alabama Gas Corporation
Atlanta Gas Light Company
The Brooklyn Union Gas Company
Central Hudson Gas and Electric Corporation
City of Norwich, Department of Public Utilities
Consolidated Edison Company of New York, Inc.
Long Island Lighting Company
New York State Electric & Gas Corporation
Philadelphia Electric Company
Philadelphia Gas Works, Division of UGI Corporation
Piedmont Natural Gas Company, Inc.
Public Service Company of North Carolina
Rochester Gas and Electric Corporation
UGI Corporation
Washington Gas Light Company

APPENDIX B

Additional Respondents

Alco Oil and Gas Corporation
Amerada Hess Corporation
Atlantic Richfield Company
Austral Oil Company, Inc. and J. Ray McDermott & Co., Inc.
Issac Arnold, et al.
Bradco Properties, Inc.
E. Cockrell, Jr.
Freeport Sulphur Company
John W. Mecom, et al.
Cabot Corporation
The California Company, a Div. of Chevron Oil Company
Cities Service Company
Cities Service Oil Company
Continental Oil Company
Federal Power Commission

Forest Oil Corporation
J. R. Frankel
Gas Gathering Corporation
General American Oil Company of Texas
General Crude Oil Company
Getty Oil Company
Gulf Oil Company
Estate of William G. Helis, a partnership
Humble Oil & Refining Company and Humble Gas Transmission Company
Hunt Oil Company, et al.
Kerr-McGee Corporation
Marathon Oil Company
Midwest Oil Corporation
Mobil Oil Corporation
Municipal Distributor Group
comprising Memphis Light, Gas and Water Division, City of Dyersburg, Gibson County Utility District, City of Humboldt Board of Public Utilities, Jackson Utility Division of the City of Jackson, Tennessee, City of Brownsville, Town of Covington, Tipton County Utility Company, Inc., Crockett Utility District of Crockett County, Tennessee, Bells Utility District of Crockett County, Tennessee, and American Public Gas Association, having a membership of 201 public systems operating in 28 states.
Newmont Oil Company
Ocean Drilling and Exploration Company
Pan American Petroleum Corp.
Phillips Petroleum Company
Public Service Commission of the State of N. Y.
Samedan Oil Corporation
Shell Oil Company
Sohio Petroleum Company
Southern Natural Gas Company
Tennessee Gas Pipeline Company (a Division of Tenneco Inc.)
Texas Eastern Transmission Corp.

Texas Gas Transmission Corp.
Transcontinental Gas Pipe Line Corp.
Trunkline Gas Company
United Fuel Gas Company
United Gas Pipeline Company
Southwest Gas Producing Company
Sun Oil Company
The Superior Oil Company
Tenneco Oil Company
Texaco Inc.
Union Oil Company of California
Union Texas Petroleum, a Division of Allied Chemical Corporation

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v.

Federal Power Commission, et al.,
Respondents.

No. 691

Associated Gas Distributors,
Petitioners,

v.

Austral Oil Company, et al.,
Respondents.

No. 692

Public Service Commission of the State of New York,
Petitioner,

v.

Amerada Hess Corporation, et al.,
Respondents.

BRIEF OF RESPONDENT E. COCKRELL, JR. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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Nos. 669, ET AL.

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MUNICIPAL DISTRIBUTOR GROUP,
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No. 691

ASSOCIATED GAS DISTRIBUTORS,
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v.

AUSTRAL OIL COMPANY, ET AL.,
Respondents.

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

AMERADA HESS CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENT E. COCKRELL, JR. IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

E. Cockrell, Jr. (Cockrell), a respondent in Nos. 669, 691 and 692, and petitioner in No. 684, hereby submits his brief in opposition to the petitions filed in Nos. 669, 691 and 692 for writs of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 19, 1970.

STATEMENT

This brief is submitted in opposition to the petitions for writs of certiorari filed by the Municipal Distributor Group (MDG), the Associated Gas Distributors (AGD) and the Public Service Commission of the State of New York (NYPSC). Those petitioners have set forth parts of the history of the case before the Commission and the Court of Appeals. In his petition filed in No. 684, Cockrell has set forth a more complete statement of this case, which such statement is not here repeated but reference is here respectfully made to the same. Those portions of that history which are most pertinent to the questions presented in Nos. 669, 691 and 692 are as follows:

In its March 19, 1970, opinion, the Court of Appeals found defect after defect in the Commission's opinions and orders under review. On the "most serious issue" involving Commission findings (or lack thereof) and legal standards — termed "the supply problem" by the court — the Court of Appeals recognized that this Court held in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), that "adequate findings" would be required in the future, and noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. The Court of Appeals also specifically found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50),[1] and

[1] Petitioners Continental Oil Company, *et al.*, have filed in No. 680 Appendices to their Petition for Writ of Certiorari containing the complete text of opinions and judgment below, the agency opinions and orders and statutes involved. References herein to "Continental Appendix" are to that document. Petitioners Continental Oil Company, *et al.*, have also filed forty copies of the Joint Appendix in the Court of Appeals which consisted of four volumes designated as Part I and two volumes designated as Part II. A citation here to "III J.A. (I)

(Continued)

laid bare other defects in "findings" (or lack thereof) on related questions of supply, demand and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The Court of Appeals also noted existence of more current data then and now available to the Commission, including the study by the Commission's own Staff released in October, 1969, indicating "perhaps a certainty, that the supply of gas is dangerously low" and that "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). The court found that assessment of crucial facts as to supply, demand and impact of prescribed rates called for by *Permian* had not been made in this case by the Commission.

Therefore, the Court of Appeals expressed "serious misgivings about affirming the Commission" and did so only with affirmative statements that the Commission still may "set aside the present order pending further determination" (Continental Appendix A, pp. 56-57); that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Continental Appendix A, p. 59); that "the Commission must explain the relationship between the level of service, the demand for service, and the price it sets" (Continental Appendix A, p. 68); that the "mandate" of the court should not "be interpreted to interfere with Commission action that would change the rates" (Continental Appendix A, p. 69); that, citing Section 16 of the Natural Gas Act (Act) and with emphasis supplied, the Commission had power to "rescind" its orders; and, that dissolution of the court's stay would be without prejudice to Commission power "to stay its own order or to take any

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[1] (Continued)
62d" therefore refers to Volume III of Part I, page 62d. Such page designations appear at the bottom of each page, and pages included in each of the volumes are shown in parentheses at the bottom of the cover of each volume of that Joint Appendix.

other appropriate action affecting this case" (Continental Appendix A, p. 70).

Thereafter, petitions for rehearing raised, *inter alia*, questions of whether an "affirmance" by the Court of Appeals could leave the Commission with unimpaired powers to stay, vacate, modify or rescind its orders, as contemplated by the court. The court thereupon directed the Commission to respond to the petitions and to two specific questions concerning (i) Commission authority to stay, modify or rescind an order that has been "affirmed"; and, (ii) equitable power of the court to "affirm" while preserving Commission powers "to stay, modify or rescind" an order.[1]

In response, the Commission (i) took the position that it would not "have authority to permit any *retroactive* increases or decreases in a rate order, unless authorized to do so by a court"[2]; (ii) stated that extent of the court's "equitable powers" had not been decided, and the court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing"; (iii) noted the need for clarification of the court's

[1] The full text of the questions posed by the Court of Appeals to the Commission is:

"1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

"2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

[2] Emphasis by the Commission.

intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full' "; and, (iv) requested a "remand" so "that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion."

On June 16, 1970, the court entered its order denying the petitions for rehearing and also entered an opinion stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Continental Appendix B, p. 1). The court stated:

> "... We wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> "At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all other respects, the original opinion of this Court is the final disposition of this appeal."[4]

On July 2, 1970, the Commission entered an order staying its own orders, effective upon dissolution of the Court of Appeals' stay. On July 14, 1970, the Court of Appeals issued its judgment as mandate, and the Commission stay thus is and remains in effect.

A motion presently pends before the Commission seeking (i) reopening of the proceeding in Docket No. AR61-2, (ii) consolidation of Docket No. AR61-2 with the Commission's Docket No. AR69-1 in which more current data as to natural gas demand and supply and as to related industry capital requirements have already been presented, and (iii) modification of the opinions and orders reviewed below in light of the record before the Commission in the reopened proceeding.

ARGUMENT

In the Court of Appeals, Cockrell sought express reversal of the Commission on a number of substantive issues and a remand expressly directing the Commission (i) to set aside the opinions and orders under review, (ii) to receive additional evidence, and (iii) to prescribe prices on the basis of current data as to demand, supply, deficiencies and industry capital requirements. The Court of Appeals declined to grant the requested relief. Instead, the Court of Appeals adopted a disposition which would permit the Commission, in the first instance, to reconsider its opinions and orders fully, without express directives from the court, and to decide what further steps are warranted.

As set forth in Cockrell's petition in No. 684 which presently pends before this Court, it is Cockrell's position that

[4] Continental Appendix B, pp. 2-3. Emphasis by the Court.

the Court of Appeals committed reversible error in not reversing the Commission and formally remanding the case to the Commission with explicit directions to rescind the opinions and orders on review and to reconsider such opinions and orders on the basis of additional relevant and current evidence. Thus, Cockrell continues to pray for the relief sought in his petition in No. 684; however, notwithstanding the foregoing, it is Cockrell's further position that MDG, AGD and NYPSC are each in error in their assertions, *inter alia*, that the Court of Appeals lacked the power, as such, to effectively withhold finality of a judgment of affirmance and by express terms in the court's June 16, 1970, opinion permit the Commission to reconsider its opinions and orders. In the discussion *infra* with respect to the validity of such disposition by the Court of Appeals, Cockrell does not waive the contentions set forth in his petition in No. 684, but, to the contrary, relies thereon.

Although declining to expressly reverse and remand, the Court of Appeals very obviously intended to leave the Commission the capability — as sought by the Commission's request for remand — to reconsider its orders as fully as on an application for rehearing and to consider anew motions for reopening or for leave to adduce additional evidence. The Commission had already reserved as subject to its own further orders, questions as to amounts collected subject to refund prior to October 1, 1968 (Continental Appendix D, pp. 186-187), and, under the disposition by the court below, amounts collected subsequent to October 1, 1968, under the stays entered by the Court of Appeals and the Commission, likewise are subject to further Commission order.[5] Thus, should the Commission find it in the

[5] As to the general authority of the court and the agency over such funds collected and being collected subject to refund and stay orders, see *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949).

public interest, the Commission may retrospectively or prospectively adjust the orders on review as they relate to or control these funds.

The funds in issue thus have been, are, and remain, limited to amounts so collected under the rates at issue *in this case*. The Commission orders here involved also have not become final as a result of the express terms in the Commission's opinion cited *supra*, and orders entered by the agency and the court below. Thus, contrary to assertions by MDG, AGD and NYPSC, questions involving "reparations," collateral modification of final "filed" rates, or "retroactive" changes of final rate orders are simply not presented because of, *inter alia*, the limits on "affirmance" prescribed below in the Court of Appeals' June 16, 1970, opinion. Similarly, "retroactive" increases above rates heretofore charged, collected and received for past periods also are not involved (*cf.* MDG Petition, pp. 16-17).

I. The Court of Appeals' Disposition Under the Opinion of June 16, 1970, Was Within Its Authority Under Section 19(b) of the Natural Gas Act

MDG, AGD and NYPSC argue that the Court of Appeals' disposition is wholly beyond the court's authority under Section 19(b) of the Act (MDG Petition, pp. 19-22; AGD Petition, pp. 9-10; NYPSC Petition, pp. 16-20). However, because of the express terms of the court's opinion of June 16, 1970, such argument is without merit. Although Cockrell submits that reversal and remand with express directions for rescission were and are required in this case,[6] the narrower, alternative, limited disposition on "equitable" grounds under terms of the court's June 16, 1970, opinion is not defective on the grounds of lack of power in a court

[6] See Cockrell's Petition in No. 684.

to so-limit effect of its own expressions of "affirmance" of a Commission order.

MDG, AGD and NYPSC appear to argue as though there had been a final "affirmance" below without more, as though the court's opinion of March 19, 1970, stood as a final, unqualified "affirmance," and as though the express limits in the court's June 16, 1970, opinion had never been written.[7] Contrary to their arguments, however, the court did limit the effect of its March 19, 1970, opinion and holdings by designful terms in the June 16, 1970, opinion, clarifying its March 19, 1970, opinion and intentionally withholding any effects of an unqualified "judgment" of "affirmance" that might have barred required, unrestricted Commission reconsideration.

This case, therefore, simply does not present questions as to agency or judicial powers of "rescission" under Section 16 of the Act framed by MDG, or broadly drawn questions posed by MDG, by AGD and by NYPSC as to general agency powers to rescind or otherwise modify an agency order which has been affirmed without such express qualifications or limitations, as here. Section 19(b) of the Act empowers courts of appeals to "affirm, modify or set

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[7] In this respect, the two questions stated by MDG, in particular, are not presented in this case (see MDG Petition, p. 1). MDG's first question is drawn as though the June 16, 1970, opinion, and express limits therein, had never been written by the Court of Appeals, and as though the court's holdings of June 16, 1970, rested upon a construction of Section 16 of the Act instead of Section 19(b) as expressly stated by the court. MDG's second question assumes the Court of Appeals held it has the power to fix rates "retroactively" and has conferred this "equitable power" upon the Commission. However, there are no such holdings below; the Court of Appeals withheld finality of its "affirmance," preserving the Commission's statutory authority to reconsider its orders; in so doing, the Court of Appeals referred to its "equitable powers" as a reviewing court under Section 19(b), not to any purported judicial authority to "reverse" rates "retroactively" (*cf.* MDG Petition, p. 3).

aside" a Commission order "in whole or in part," to order additional "evidence to be taken before the Commission . . . in such manner and upon such terms and conditions as to the court may seem proper"; and to enter stays of Commission orders. Significantly, in this instance, prior to entry of its June 16, 1970, opinion, the Court of Appeals had before it (i) renewals of motions under Section 19(b) for leave to adduce additional evidence before the Commission, (ii) petitions urging that finality of an unqualified "affirmance" must be withheld, and (iii) *the Commission's formal request for remand.* The Court of Appeals thus expressly limited its "affirmance" and made provision for continuation of stay by the agency, with the result that finality of an "affirmance" without qualification did not attach and Commission opportunity for reconsideration is preserved.

This Court has stated that authority of a Court of Appeals under a review statute similar to Section 19(b) of the Act does include "equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Company* v. *National Labor Relations Board,* 305 U.S. 364, 373 (1939). In that instance, a remand for further proceedings without reversal or setting aside of the agency order was sustained; and under similar readings, such remedies as "affirmance" coupled with express granting of motions for leave to adduce additional evidence also have been fashioned.[8]

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[8] See *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board,* 104 F.2d 49 (8th Cir. 1939); *Dolcin Corporation* v. *Federal Trade Commission,* 219 F.2d 742 (D.C. Cir. 1954), cert. den. 348 U.S. 981 (1955). See also *United States* v. *Brown,* 331 F.2d 362, 365 (10th Cir. 1964); *National Labor Relations Board* v. *Central Mercedita, Inc.,* 273 F.2d 370 (1st Cir. 1959).

Where a reviewing court so *expressly* fashions a remedy and so *expressly* limits its holdings, as in the June 16, 1970, opinion below, the "'. . . great principles of equity, securing complete justice, should not yield to light inferences or doubtful construction.'" *Porter* v. *Warner Holding Company*, 328 U.S. 395, 398 (1946) (citing *Brown* v. *Swann*, 10 Pet. (U.S.) 497 (1836)). See also *Arkadelphia Milling Company* v. *St. Louis Sw. Ry. Co.*, 249 U.S. 134 (1919); *United States* v. *Morgan*, 307 U.S. 183, 197 (1939). A conclusion expressed in *Ford Motor Company* v. *National Labor Relations Board, supra*, is pertinent:

> "There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid." (305 U.S. at 375)

The language in the June 16, 1970, opinion harks back to a similar early reading of Section 19(b) of the Act in *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 128 F.2d 481 (7th Cir. 1942), in which the principles of the *Ford Motor Company* case were applied:

> ". . . In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission, the National Labor Relations Board, and various other administrative bodies. We have previously said in Century Metalcraft Corporation v. Federal Trade Commission, 7 Cir., 112 F.2d 443, that, under the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment whenever good cause is shown. This is in

accord with announcements of other jurisdictions. We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. Butterick Co. v. Federal Trade Commission, 2 Cir., 4 F.2d 910; Silver Co. v. Federal Trade Commission, 6 Cir., 292 F. 752; Chamber of Commerce v. Federal Trade Commission, 8 Cir., 13 F.2d 673; Federal Trade Commission v. Balme, 2 Cir., 23 F.2d 615, certiorari denied 277 U.S. 598, 48 S.Ct. 560, 72 L.Ed. 1007; Indiana Quartered Oak Co. v. Federal Trade Commission, 2 Cir., 58 F.2d 182." (128 F.2d at 484)

An "affirmance" without such limits, qualifications or other express definition by the reviewing court, therefore, is not presented by virtue of the opinion of June 16, 1970, in this case. While Cockrell submits that reversal and express directives were and are required, the narrower disposition below, leaving initial decision as to corrective action to the agency, was otherwise within the Court of Appeals' prerogatives under Section 19(b) of the Act. Different results compelling specific corrective Commission action are required in this case, but, nevertheless, MDG, AGD and NYPSC clearly err in asserting that the Court of Appeals was without power to so fashion the remedy explicitly provided in the court's June 16, 1970, opinion.

II. The Disposition Under the June 16, 1970, Opinion Does Not Present Conflicts With Decisions of this Court or of the Courts of Appeals

MDG, AGD and NYPSC also argue that the disposition below conflicts with holdings that (i) the Commission has

no power to award reparations, and (ii) filed rates effective by final or "affirmed" Commission action may not be set aside subsequently or collaterally (MDG Petition, pp. 16-17, 20; AGD Petition, pp. 9-10; NYPSC Petition, pp. 16-19). No such conflicts with decisions of this Court or of the Courts of Appeals are presented in light of the provisions of the court's June 16, 1970, opinion.

It is, of course, well settled that the Commission has no "reparations" powers, and that the "filed rate" principle applies under the Act.[9] It is also settled that agency orders which become final as a result of unqualified judicial affirmance, or otherwise by operation of law, generally are not subject to retroactive change or collateral modification.[10] In this case, however, no conflict with these constructions or principles results by virtue of the express, considered, terms of the June 16, 1970, opinion. As shown *supra*, the rates in issue have not become "final," and neither "reparations" nor "retroactive" ratemaking are thus involved.

Thus, the rates in issue in this case have never become "final" filed rates or otherwise made the "legal rate" by Commission action no longer subject to Commission reconsideration under Section 19(b) or judicial review under Section 19(b), in the sense these terms are used in cases cited by MDG, AGD and NYPSC.

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[9] As to these constructions, MDG, AGD and NYPSC correctly cite *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *State Corporation Commission of Kansas* v. *Federal Power Commission*, 215 F.2d 176 (8th Cir. 1954). See also *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe R. Co.*, 284 U.S. 370 (1932).

[10] As to these principles, MDG, AGD and NYPSC correctly cite *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

Asserted "conflicts" claimed by MDG, AGD and NYPSC, therefore, are not existent in light of the express terms of the court's order, which such terms preclude the result now claimed by such petitioners. The possible appearance of "conflict" in holdings was thereby deliberately and intentionally removed by the court below in terms qualifying its affirmance, withholding finality and otherwise precluding any operative effect of its judgment impairing Commission reconsideration of the opinions and orders on review. The questions of conflicts posed by MDG, AGD and NYPSC thus would only properly arise if the June 16, 1970, opinion had not been entered by the Court of Appeals.

III. NYPSC Does Not Present A Substantial Question Involving Commission Prescription of Area Rates

NYPSC sets forth a question concerning alleged "cushions" raising the "rate of return" (NYPSC Petition, p. 3, pp. 20-21). Such question actually pertains to a portion of the Commission's opinion involving rate design which was sustained below as fully supported by substantial evidence and required findings, and as consistent with the area rate methodology affirmed by this Court in *Permian*. The question, therefore, presents no issue involving conflict with opinions of this Court, of the Court of Appeals for the District of Columbia Circuit or of any other court; and the question does not warrant review here on any ground asserted by NYPSC.

In *Permian*, this Court sustained Commission use of "non-cost" economic factors in prescribing "area rates," particularly if there were known imperfections or other recognized deficiencies in any "cost" data used. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 791, 815 (1968). These and other steps in the Commission's methodology do not

involve "cushions," "bonuses" or "boosts" of the "rate of return" despite NYPSC's artful labeling. As correctly found below (Continental Appendix A, pp. 27-28, footnotes omitted):

> "Even if we were to construe this case [the *Williams* case cited by NYPSC] as broadly disapproving noncost elements, the application to the sprawling, wildcatting gas producing industry of principles developed in regulating bus and telephone companies would require major adjustments. But this is not the extent of our disagreement with the argument advanced by these intervening parties. We do not understand the law of industry regulation, including the Williams case, to prohibit noncost elements that are based upon appropriate grounds. In *Permian*, the Supreme Court unequivocally stated that the FPC is not bound by the sum of cost and return even if it adopts costs as the primary basis of its calculations. The most persuasive reason for this rule is that cost pricing is circular. Past production has taken place at a given level; if a regulatory body fixes prospective prices at the cost of that production, it may be freezing the level of production, too. We think that the need for dramatically increased production from Southern Louisiana justifies the noncost factors added here, and that the FPC has power to include noncost elements that reflect its assessment of the need to use price as a tool to influence such economic relations. These are propositions that apply generally to regulation of utilities and quasi-utilities."

The court below also disposed of each of NYPSC's specific arguments by reference to the Commission's findings and the record. Repetition of the same arguments here does not present an issue differing from questions disposed of by *Permian* or now warranting another review by this Court.

IV. Disposition Under the Opinion of June 16, 1970, Permits A Result Consistent With the Public Interest and Commission Responsibility for Natural Gas Supply

MDG, AGD and NYPSC each argue, with differing language and emphasis, that Commission reconsideration under the Court of Appeals' opinion of June 16, 1970, necessarily is, or may produce results, contrary to the public interest and the Act's standards (MDG Petition, pp. 13-14, 20-22; AGD Petition, pp. 7-8; NYPSC Petition, pp. 14-15, 17-20). This is not correct. Commission reconsideration and corrective action are urgently required;[11] and, in any event, the disposition below permits the responsible regulatory agency to consider the relevant facts now available and make the determinations in the first instance which now vitally affect current and future area and national gas supply.

Numerous documents presented below and in this Court emphasize facts emergent since 1968 reflecting a present critical shortage of natural gas.[12] A chain relationship is involved, requiring reference to demand, supply, exploratory efforts, capital required and capital actually available under the Commission's 1968 orders. The court below correctly recognized that the Commission should be the body to initially reassess these relationships. Before funds are dissipated under the orders of 1968 to pipeline companies and thence to AGD, MDG and other corporations or local government bodies not subject to the Commission's jurisdiction, the Commission thus is charged by the court with reconsidering those orders in light of new facts reflecting supply deficiencies and declining exploration, development and capital now required for exploration and production.

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[11] See Cockrell's Petition in No. 684.

[12] See e.g., Appendices to Petition of The California Company in No. 682.

The nature, size, cause and cure for a supply shortage and for rising capital needs also were not decided by the court below. That court correctly recognized that the interests of all affected parties, *and the public interest*, will be best served if the Commission is afforded the opportunity for reassessment of these facts before funds are paid over and passed on to AGD and MDG.

It is clear that neither MDG, nor AGD, nor NYPSC can conclusively argue or show that rates or "refunds" based on findings concerning stale data, obsolete assumptions and misconceptions of a plentiful gas supply are in "the public interest." The public interest in, and the Commission's responsibility for, an existent natural gas supply for consumers, as underscored in *Permian*, are inextricably intertwined, as recognized by the court below. As to the supply shortage and any related required modifications of the Commission's 1968 orders, the court declined to accept the *ipse dixit* of any of the parties as conclusive, but called for assessment by the administrative agency in the first instance. That assessment must be permitted (and required, if need be), and is, in and of itself, a step that is in the public interest.

As to the relevant facts that should now control prescription of area rates, the court below also left these for further (and new) agency findings. Neverthelsss, MDG, AGD and NYPSC call for a pretense that economic conditions of 1956, or even 1960, now exist as to demand, supply and capital requirements. Their arguments are presented without regard for the gas supply situation described by a unanimous Federal Power Commission as recently as September 18, 1970, in a decision in the *Hugoton-Anadarko Area Rate Proceeding*, FPC Docket No. AR64-1 (FPC Opinion No. 586, pp. 19-20, mimeo. ed.):

"In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

"All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stock-pile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion."

In the present case, an area supplying up to one-third of the nation's natural gas supply is involved, and, as petitioners say, "huge sums" also are involved. The critical situation recognized below was that the public interest now calls for Commission reconsideration of its 1968 orders, and reassessment of any dissipation of funds detrimental to exploratory efforts and area and national natural gas supply. It will be only after Commission reconsideration

and reassessment that any party (or court) can allege that the ultimate result is or is not in the public interest. Such Commission reassessment must be permitted, rather than thwarted as sought by MDG, AGD and NYPSC.

V. If the Disposition Under Its Opinion of June 16, 1970, Was Beyond the Power of the Court of Appeals, Then the Court of Appeals Should Be Given the Opportunity or Required to Reconsider Its "Affirmance"

As discussed *supra*, the Court of Appeals "affirmed" the Commission with express "misgivings" and on the assumption the Commission could and would reconsider its opinions and orders in the light of (i) deficiencies enumerated by the court, and (ii) the Commission's expressions of concern over gas supply. Thus, although "affirming" the opinions and orders under review, the Court of Appeals attempted to fashion a remedy leaving the Commission free to take such corrective steps as present circumstances and facts dictate, including rescission of the deficient opinions and orders.

If the "remedy" fixed by the Court of Appeals is *not* available as a matter of law, then the "affirmance" by the Court of Appeals resulted from and rests upon serious misinterpretation of the Act as to Commission powers to act despite the "affirmance." In view of the present gas supply emergency recognized by almost all of the parties below, if this Court (i) determines that the court below erred in its "remedy," (ii) and also does not reverse the erroneous opinions and orders of the Commission and the "affirmance" thereof, then this Court should (i) summarily remand this case to the Court of Appeals with instructions to direct the Commission to reopen the case and, after further proceedings and reconsideration and reassessment, enter such

orders as the Commission may deem to be in the public interest or, in the alternative, (ii) remand the case to the Court of Appeals with instructions to the court to reconsider its judgment in the light of this Court's finding that the "remedy" directed by the Court of Appeals is not available as a matter of law.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 669, 691 and 692 should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

Supreme Court, U.S.
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Nos. 669, ET AL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner,

v.

FEDERAL POWER COMMISSION, ET AL.,
Respondents.

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

v.

AUSTRAL OIL COMPANY, ET AL.,
Respondents.

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

AMERADA HESS CORPORATION, ET AL.,
Respondents.

BRIEF OF RESPONDENTS BRADCO PROPERTIES, INC., et al., IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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October 14, 1970

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Nos. 669, et al.

In The

Supreme Court of the United States

October Term, 1970

No. 669

Municipal Distributor Group,

Petitioner,

v.

Federal Power Commission, et al.,

Respondents.

No. 691

Associated Gas Distributors,

Petitioners,

v.

Austral Oil Company, et al.,

Respondents.

No. 692

Public Service Commission of the State of New York,

Petitioner,

v.

Amerada Hess Corporation, et al.,

Respondents.

BRIEF OF RESPONDENTS BRADCO PROPERTIES, INC., et al., IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

Bradco Properties, Inc., Freeport Sulphur Company, John W. Mecom, Lake Washington Inc., U. S. Oil of Louisiana Inc. and U. S. Oil of Louisiana, Ltd. (Bradco, *et al.*), respondents in Nos. 669, 691 and 692, and petitioners in No. 683, hereby submit their brief in opposition to the petitions filed in Nos. 669, 691 and 692 for writs of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 19, 1970.

STATEMENT

This brief is submitted in opposition to the petitions for writs of certiorari filed by the Municipal Distributor Group (MDG), the Associated Gas Distributors (AGD) and the Public Service Commission of the State of New York (NYPSC). Those petitioners have set forth parts of the history of the case before the Commission and the Court of Appeals. In their petition filed in No. 683, Bradco, *et al.*, have set forth a more complete statement of this case, which such statement is not here repeated but reference is here respectfully made to the same. Those portions of that history which are most pertinent to the questions presented in Nos. 669, 681 and 682 are as follows:

In its March 19, 1970, opinion, the Court of Appeals found defect after defect in the Commission's opinions and orders under review. On the "most serious issue" involving Commission findings (or lack thereof) and legal standards — termed "the supply problem" by the court — the Court of Appeals recognized that this Court held in *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), that "adequate findings" would be required in the future, and noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. The Court of Appeals also specifically found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way." (Continental Appendix A, pp. 49-50),[1] and

[1] Petitioners Continental Oil Company, *et al.*, have filed in No. 680 Appendices to their Petition for Writ of Certiorari containing the complete text of opinions and judgment below, the agency opinions and orders and statutes involved. References herein to "Continental Appendix" are to that document. Petitioners Continental Oil Company, *et al.*, have also filed forty copies of the Joint Appendix in the Court of Appeals which consisted of four volumes designated as Part I and two volumes designated as Part II. A citation here to "III J.A. (1)

(Continued)

laid bare other defects in "findings" (or lack thereof) on related questions of supply, demand and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The Court of Appeals also noted existence of more current data then and now available to the Commission, including the study by the Commission's own Staff released in October, 1969, indicating "perhaps a certainty, that the supply of gas is dangerously low" and that "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). The court found that assessment of crucial facts as to supply, demand and impact of prescribed rates called for by *Permian* had not been made in this case by the Commission.

Therefore, the Court of Appeals expressed "serious misgivings about affirming the Commission" and did so only with affirmative statements that the Commission still may "set aside the present order pending further determination" (Continental Appendix A, pp. 56-57); that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Continental Appendix A, p. 59); that "the Commission must explain the relationship between the level of service, the demand for service, and the price it sets" (Continental Appendix A, p. 68); that the "mandate" of the court should not "be interpreted to interfere with Commission action that would change the rates" (Continental Appendix A, p. 69); that, citing Section 16 of the Natural Gas Act (Act) and with emphasis supplied, the Commission had power to "rescind" its orders; and, that dissolution of the court's stay would be without prejudice to Commission power "to stay its own order or to take any

[1] (Continued)
62d" therefore refers to Volume III of Part I, page 62d. Such page designations appear at the bottom of each page, and pages included in each of the volumes are shown in parentheses at the bottom of the cover of each volume of that Joint Appendix.

other appropriate action affecting this case". (Continental Appendix A, p. 70).

Thereafter, petitions for rehearing raised, *inter alia*, questions of whether an "affirmance" by the Court of Appeals could leave the Commission with unimpaired powers to stay, vacate, modify or rescind its orders, as contemplated by the court. The court thereupon directed the Commission to respond to the petitions and to two specific questions concerning (i) Commission authority to stay, modify or rescind an order that has been "affirmed"; and, (ii) equitable power of the court to "affirm" while preserving Commission powers "to stay, modify or rescind" an order.[2]

In response, the Commission (i) took the position that it would not "have authority to permit any *retroactive* increases or decreases in a rate order, unless authorized to do so by a court";[3] (ii) stated that extent of the court's "equitable powers" had not been decided, and the court had "full statutory power to authorize or instruct the Commission", to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing"; (iii) noted the need for clarification of the court's

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[2] The full text of the questions posed by the Court of Appeals to the Commission is:

"(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

"(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

[3] Emphasis by the Commission.

intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and; (iv) requested a "remand" so "that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion."

On June 16, 1970, the court entered its order denying the petitions for rehearing and also entered an opinion stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Continental Appendix B, p. 1). The court stated:

> ". . . We wish to make crystal clear the authority of the Commission in this case to reopen *any* part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.
>
> "At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all other respects, the original opinion of this Court is the final disposition of this appeal."[4]

On July 2, 1970, the Commission entered an order staying its own orders, effective upon dissolution of the Court of Appeals' stay. On July 14, 1970, the Court of Appeals issued its judgment as mandate, and the Commission stay thus is and remains in effect.

A motion presently pends before the Commission seeking (i) reopening of the proceeding in Docket No. AR61-2, (ii) consolidation of Docket No. AR61-2 with the Commission's Docket No. AR69-1 in which more current data as to natural gas demand and supply and as to related industry capital requirements have already been presented, and (iii) modification of the opinions and orders reviewed below in light of the record before the Commission in the reopened proceeding.

ARGUMENT

In the Court of Appeals, Bradco, *et al.*, sought express reversal of the Commission on a number of substantive issues and a remand expressly directing the Commission (i) to set aside the opinions and orders under review, (ii) to receive additional evidence, and (iii) to prescribe prices on the basis of current data as to demand, supply deficiencies and industry capital requirements. The Court of Appeals declined to grant the requested relief. Instead, the Court of Appeals adopted a disposition which would permit the Commission, in the first instance, to reconsider its opinions and orders fully, without express directives from the court, and to decide what further steps are warranted.

As set forth in their petition in No. 683 which presently pends before this Court, it is the position of Bradco, *et al.*,

[4] Continental Appendix B, pp. 2-3. Emphasis by the Court.

that the Court of Appeals committed reversible error in not reversing the Commission and formally remanding the case to the Commission with explicit directions to rescind the opinions and orders on review and to reconsider such opinions and orders on the basis of additional relevant and current evidence. Thus, Bradco, *et al.*, continue to pray for the relief sought in their petition in No. 683; however, notwithstanding the foregoing, it is their further position that MDG, AGD and NYPSC are each in error in their assertions, *inter alia*, that the Court of Appeals lacked the power, as such, to effectively withhold finality of a judgment of affirmance and by express terms in the court's June 16, 1970, opinion permit the Commission to reconsider its opinions and orders. In the discussion *infra* with respect to the validity of such disposition by the Court of Appeals, Bradco, *et al.*, do not waive the contentions set forth in their petition in No. 683, but, to the contrary, rely thereon.

Although declining to expressly reverse and remand, the Court of Appeals very obviously intended to leave the Commission the capability — as sought by the Commission's request for remand — to reconsider its orders as fully as on an application for rehearing and to consider anew motions for reopening or for leave to adduce additional evidence. The Commission had already reserved as subject to its own further orders, questions as to amounts collected subject to refund prior to October 1, 1968 (Continental Appendix D, pp. 186-187), and, under the disposition by the court below, amounts collected subsequent to October 1, 1968, under the stays entered by the Court of Appeals and the Commission, likewise are subject to further Commission order.[5] Thus, should the Commission find it in the

[5] As to the general authority of the court and the agency over such funds collected and being collected subject to refund and stay orders, see *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577 (1949).

public interest, the Commission may retrospectively or prospectively adjust the orders on review as they relate to or control these funds.

The funds in issue thus have been, are, and remain, limited to amounts so collected under the rates at issue *in this case*. The Commission orders here involved also have not become final as a result of the express terms in the Commission's opinion cited *supra*, and orders entered by the agency and the court below. Thus, contrary to assertions by MDG, AGD and NYPSC, questions involving "reparations," collateral modification of final "filed" rates, or "retroactive" changes of final rate orders are simply not presented because of, *inter alia*, the limits on "affirmance" prescribed below in the Court of Appeals' June 16, 1970, opinion. Similarly, "retroactive" increases above rates heretofore charged, collected and received for past periods also are not involved (*cf.* MDG Petition, pp. 16-17).

I. The Court of Appeals' Disposition Under the Opinion of June 16, 1970, Was Within Its Authority Under Section 19(b) of the Natural Gas Act

MDG, AGD and NYPSC argue that the Court of Appeals' disposition is wholly beyond the court's authority under Section 19(b) of the Act (MDG Petition, pp. 19-22; AGD Petition, pp. 9-10; NYPSC Petition, pp. 16-20). However, because of the express terms of the court's opinion of June 16, 1970, such argument is without merit. Although Bradco, *et al.*, submit that reversal and remand with express directions for rescission were and are required in this case,[6] the narrower, alternative, limited disposition on "equitable" grounds under terms of the court's June 16, 1970, opinion is not defective on the grounds of lack of power in a court

[6] See Petition in No. 683.

to so limit effect of its own expressions of "affirmance" of a Commission order.

MDG, AGD and NYPSC appear to argue as though there had been a final "affirmance" below without more, as though the court's opinion of March 19, 1970, stood as a final, unqualified "affirmance," and as though the express limits in the court's June 16, 1970, opinion had never been written.[7] Contrary to their arguments, however, the court did limit the effect of its March 19, 1970, opinion and holdings by designful terms in the June 16, 1970, opinion, clarifying its March 19, 1970, opinion and intentionally withholding any effects of an unqualified "judgment" of "affirmance" that might have barred required, unrestricted Commission reconsideration.

This case, therefore, simply does not present questions as to agency or judicial powers of "rescission" under Section 16 of the Act framed by MDG, or broadly drawn questions posed by MDG, by AGD and by NYPSC as to general agency powers to rescind or otherwise modify an agency order which has been affirmed without such express qualifications or limitations, as here. Section 19(b) of the Act empowers courts of appeals to "affirm, modify or set

[7] In this respect, the two questions stated by MDG, in particular, are not presented in this case (see MDG Petition, p. 1). MDG's first question is drawn as though the June 16, 1970, opinion, and express limits therein, had never been written by the Court of Appeals, and as though the court's holdings of June 16, 1970, rested upon a construction of Section 16 of the Act instead of Section 19(b) as expressly stated by the court. MDG's second question assumes the Court of Appeals held it has the power to fix rates "retroactively" and has conferred this "equitable power" upon the Commission. However, there are no such holdings below; the Court of Appeals withheld finality of its "affirmance," preserving the Commission's statutory authority to reconsider its orders; in so doing, the Court of Appeals referred to its "equitable powers" as a reviewing court under Section 19(b), not to any purported judicial authority to "reverse" rates "retroactively" (*cf.* MDG Petition, p. 3).

aside" a Commission order "in whole or in part," to order additional "evidence to be taken before the Commission . . . in such manner and upon such terms and conditions as to the court may seem proper"; and to enter stays of Commission orders. Significantly, in this instance, prior to entry of its June 16, 1970, opinion, the Court of Appeals had before it (i) renewals of motions under Section 19(b) for leave to adduce additional evidence before the Commission, (ii) petitions urging that finality of an unqualified "affirmance" must be withheld, and (iii) *the Commission's formal request for remand*. The Court of Appeals thus expressly limited its "affirmance" and made provision for continuation of stay by the agency, with the result that finality of an "affirmance" without qualification did not attach and Commission opportunity for reconsideration is preserved.

This Court has stated that authority of a Court of Appeals under a review statute similar to Section 19(b) of the Act does include "equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Company* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939). In that instance, a remand for further proceedings without reversal or setting aside of the agency order was sustained; and under similar readings, such remedies as "affirmance" coupled with express granting of motions for leave to adduce additional evidence also have been fashioned.[8]

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[8] See *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F.2d 49 (8th Cir. 1939); *Dolcin Corporation* v. *Federal Trade Commission*, 219 F.2d 742 (D.C. Cir. 1954), cert. den. 348 U.S. 981 (1955). See also *United States* v. *Brown*, 331 F.2d 362, 365 (10th Cir. 1964); *National Labor Relations Board* v. *Central Mercedita, Inc.*, 273 F.2d 370 (1st Cir. 1959).

Where a reviewing court so *expressly* fashions a remedy and so *expressly* limits its holdings, as in the June 16, 1970, opinion below, the "'. . . great principles of equity, securing complete justice, should not yield to light inferences or doubtful construction.'" *Porter* v. *Warner Holding Company*, 328 U.S. 395, 398 (1946) (citing *Brown* v. *Swann*, 10 Pet. (U.S.) 497 (1836)). See also *Arkadelphia Milling Company* v. *St. Louis Sw. Ry. Co.*, 249 U.S. 134 (1919); *United States* v. *Morgan*, 307 U.S. 183, 197 (1939). A conclusion expressed in *Ford Motor Company* v. *National Labor Relations Board, supra;* is pertinent:

> "There is nothing in the statute, or in the principles governing judicial review of administrative action, which precludes the court from giving an administrative body an opportunity to meet objections to its order by correcting irregularities in procedure, or supplying deficiencies in its record, or making additional findings where these are necessary, or supplying findings validly made in the place of those attacked as invalid." (305 U.S. at 375)

The language in the June 16, 1970, opinion harks back to a similar early reading of Section 19(b) of the Act in *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 128 F.2d 481 (7th Cir. 1942), in which the principles of the *Ford Motor Company* case were applied:

> ". . . In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission, the National Labor Relations Board, and various other administrative bodies. We have previously said in Century Metalcraft Corporation v. Federal Trade Commission, 7 Cir., 112 F.2d 443, that, under the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment whenever good cause is shown. This is in

accord with announcements of other jurisdictions. We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit. Butterick Co. v. Federal Trade Commission, 2 Cir., 4 F.2d 910; Silver Co. v. Federal Trade Commission, 6 Cir., 292 F. 752; Chamber of Commerce v. Federal Trade Commission, 8 Cir., 13 F.2d 673; Federal Trade Commission v. Balme, 2 Cir., 23 F.2d 615, certiorari denied 277 U.S. 598, 48 S.Ct. 560, 72 L.Ed. 1007; Indiana Quartered Oak Co. v. Federal Trade Commission, 2 Cir., 58 F.2d 182." (128 F.2d at 484)

An "affirmance" without such limits, qualifications or other express definition by the reviewing court, therefore, is not presented by virtue of the opinion of June 16, 1970, in this case. While Bradco, *et al.*, submit that reversal and express directives were and are required, the narrower disposition below, leaving initial decision as to corrective action to the agency, was otherwise within the Court of Appeals' prerogatives under Section 19(b) of the Act. Different results compelling specific corrective Commission action are required in this case, but, nevertheless, MDG, AGD and NYPSC clearly err in asserting that the Court of Appeals was without power to so fashion the remedy explicitly provided in the court's June 16, 1970, opinion.

II. The Disposition Under the June 16, 1970, Opinion Does Not Present Conflicts With Decisions of this Court or of the Courts of Appeals

MDG, AGD and NYPSC also argue that the disposition below conflicts with holdings that (i) the Commission has

no power to award reparations, and (ii) filed rates effective by final or "affirmed" Commission action may not be set aside subsequently or collaterally (MDG Petition, pp. 16-17, 20; AGD Petition, pp. 9-10; NYPSC Petition, pp. 16-19). No such conflicts with decisions of this Court or of the Courts of Appeals are presented in light of the provisions of the court's June 16, 1970, opinion.

It is, of course, well settled that the Commission has no "reparations" powers, and that the "filed rate" principle applies under the Act.[9] It is also settled that agency orders which become final as a result of unqualified judicial affirmance, or otherwise by operation of law, generally are not subject to retroactive change or collateral modification.[10] In this case, however, no conflict with these constructions or principles results by virtue of the express, considered, terms of the June 16, 1970, opinion. As shown *supra*, the rates in issue have not become "final," and neither "reparations" nor "retroactive" ratemaking are thus involved.

Thus, the rates in issue in this case have never become "final" filed rates or otherwise made the "legal rate" by Commission action no longer subject to Commission reconsideration under Section 19(b) or judicial review under Section 19(b), in the sense these terms are used in cases cited by MDG, AGD and NYPSC.

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[9] As to these constructions, MDG, AGD and NYPSC correctly cite *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *State Corporation Commission of Kansas* v. *Federal Power Commission*, 215 F.2d 176 (8th Cir. 1954). See also *Arizona Grocery Co.* v. *Atchison, Topeka & Santa Fe R. Co.*, 284 U.S. 370 (1932).

[10] As to these principles, MDG, AGD and NYPSC correctly cite *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

Asserted "conflicts" claimed by MDG, AGD and NYPSC, therefore, are not existent in light of the express terms of the court's order, which such terms preclude the result now claimed by such petitioners. The possible appearance of "conflict" in holdings was thereby deliberately and intentionally removed by the court below in terms qualifying its affirmance, withholding finality and otherwise precluding any operative effect of its judgment impairing Commission reconsideration of the opinions and orders on review. The questions of conflicts posed by MDG, AGD and NYPSC thus would only properly arise if the June 16, 1970, opinion had not been entered by the Court of Appeals.

III. NYPSC Does Not Present A Substantial Question Involving Commission Prescription of Area Rates

NYPSC sets forth a question concerning alleged "cushions" raising the "rate of return" (NYPSC Petition, p. 3; pp. 20-21). Such question actually pertains to a portion of the Commission's opinion involving rate design which was sustained below as fully supported by substantial evidence and required findings, and as consistent with the area rate methodology affirmed by this Court in *Permian*. The question, therefore, presents no issue involving conflict with opinions of this Court, of the Court of Appeals for the District of Columbia Circuit or of any other court; and the question does not warrant review here on any ground asserted by NYPSC.

In *Permian*, this Court sustained Commission use of "non-cost" economic factors in prescribing "area rates," particularly if there were known imperfections or other recognized deficiencies in any "cost" data used. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 791, 815 (1968). These and other steps in the Commission's methodology do not

involve "cushions," "bonuses" or "boosts" of the "rate of return" despite NYPSC's artful labeling. As correctly found below (Continental Appendix A, pp. 27-28, footnotes omitted):

> "Even if we were to construe this case [the *Williams* case cited by NYPSC] as broadly disapproving noncost elements, the application to the sprawling, wildcatting gas producing industry of principles developed in regulating bus and telephone companies would require major adjustments. But this is not the extent of our disagreement with the argument advanced by these intervening parties. We do not understand the law of industry regulation, including the Williams case, to prohibit noncost elements that are based upon appropriate grounds. In *Permian*, the Supreme Court unequivocally stated that the FPC is not bound by the sum of cost and return even if it adopts costs as the primary basis of its calculations. The most persuasive reason for this rule is that cost pricing is circular. Past production has taken place at a given level; if a regulatory body fixes prospective prices at the cost of that production, it may be freezing the level of production, too. We think that the need for dramatically increased production from Southern Louisiana justifies the noncost factors added here, and that the FPC has power to include noncost elements that reflect its assessment of the need to use price as a tool to influence such economic relations. These are propositions that apply generally to regulation of utilities and quasi-utilities."

The court below also disposed of each of NYPSC's specific arguments by reference to the Commission's findings and the record. Repetition of the same arguments here does not present an issue differing from questions disposed of by *Permian* or now warranting another review by this Court.

IV. Disposition Under the Opinion of June 16, 1970, Permits A Result Consistent With the Public Interest and Commission Responsibility for Natural Gas Supply

MDG, AGD and NYPSC each argue, with differing language and emphasis, that Commission reconsideration under the Court of Appeals' opinion of June 16, 1970, necessarily is, or may produce results, contrary to the public interest and the Act's standards (MDG Petition, pp. 13-14, 20-22; AGD Petition, pp. 7-8; NYPSC Petition, pp. 14-15, 17-20). This is not correct. Commission reconsideration and corrective action are urgently required;[11] and, in any event, the disposition below permits the responsible regulatory agency to consider the relevant facts now available and make the determinations in the first instance which now vitally affect current and future area and national gas supply.

Numerous documents presented below and in this Court emphasize facts emergent since 1968 reflecting a present critical shortage of natural gas.[12] A chain relationship is involved, requiring reference to demand, supply, exploratory efforts, capital required and capital actually available under the Commission's 1968 orders. The court below correctly recognized that the Commission should be the body to initially reassess these relationships. Before funds are dissipated under the orders of 1968 to pipeline companies and thence to AGD, MDG and other corporations or local government bodies not subject to the Commission's jurisdiction, the Commission thus is charged by the court with reconsidering those orders in light of new facts reflecting supply deficiencies and declining exploration, development and capital now required for exploration and production.

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[11] See Petition in No. 683.

[12] See e.g., Appendices to Petition of The California Company in No. 682.

The nature, size, cause and cure for a supply shortage and for rising capital needs also were not decided by the court below. That court correctly recognized that the interests of all affected parties, *and the public interest*, will be best served if the Commission is afforded the opportunity for reassessment of these facts before funds are paid over and passed on to AGD and MDG.

It is clear that neither MDG, nor AGD, nor NYPSC can conclusively argue or show that rates or "refunds" based on findings concerning stale data, obsolete assumptions and misconceptions of a plentiful gas supply are in "the public interest." The public interest in, and the Commission's responsibility for, an existent natural gas supply for consumers, as underscored in *Permian*, are inextricably intertwined, as recognized by the court below. As to the supply shortage and any related required modifications of the Commission's 1968 orders, the court declined to accept the *ipse dixit* of any of the parties as conclusive, but called for assessment by the administrative agency in the first instance. That assessment must be permitted (and required, if need be), and is, in and of itself, a step that is in the public interest.

As to the relevant facts that should now control prescription of area rates, the court below also left these for further (and new) agency findings. Nevertheless, MDG, AGD and NYPSC call for a pretense that economic conditions of 1956, or even 1960, now exist as to demand, supply and capital requirements. Their arguments are presented without regard for the gas supply situation described by a unanimous Federal Power Commission as recently as September 18, 1970, in a decision in the *Hugoton-Anadarko Area Rate Proceeding*, FPC Docket No. AR64-1 (FPC Opinion No. 586, pp. 19-20, mimeo. ed.):

"In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

"'All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stock-pile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion."

In the present case, an area supplying up to one-third of the nation's natural gas supply is involved, and, as petitioners say, "huge sums" also are involved. The critical situation recognized below was that the public interest now calls for Commission reconsideration of its 1968 orders, and reassessment of any dissipation of funds detrimental to exploratory efforts and area and national natural gas supply. It will be only after Commission reconsideration

and reassessment that any party (or court) can allege that the ultimate result is or is not in the public interest. Such Commission reassessment must be permitted, rather than thwarted as sought by MDG, AGD and NYPSC.

V. If the Disposition Under Its Opinion of June 16, 1970, Was Beyond the Power of the Court of Appeals, Then the Court of Appeals Should Be Given the Opportunity or Required to Reconsider Its "Affirmance"

As discussed *supra*, the Court of Appeals "affirmed" the Commission with express "misgivings" and on the assumption the Commission could and would reconsider its opinions and orders in the light of (i) deficiencies enumerated by the court, and (ii) the Commission's expressions of concern over gas supply. Thus, although "affirming" the opinions and orders under review, the Court of Appeals attempted to fashion a remedy leaving the Commission free to take such corrective steps as present circumstances and facts dictate, including rescission of the deficient opinions and orders.

If the "remedy" fixed by the Court of Appeals is *not* available as a matter of law, then the "affirmance" by the Court of Appeals resulted from and rests upon serious misinterpretation of the Act as to Commission powers to act despite the "affirmance." In view of the present gas supply emergency recognized by almost all of the parties below, if this Court (i) determines that the court below erred in its "remedy," (ii) and also does not reverse the erroneous opinions and orders of the Commission and the "affirmance" thereof, then this Court should (i) summarily remand this case to the Court of Appeals with instructions to direct the Commission to reopen the case and, after further proceedings and reconsideration and reassessment, enter such

orders as the Commission may deem to be in the public interest or, in the alternative, (ii) remand the case to the Court of Appeals with instructions to the court to reconsider its judgment in the light of this Court's finding that the "remedy" directed by the Court of Appeals is not available as a matter of law.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 669, 691 and 692 should be denied.

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October 14, 1970

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Nos. 669, 691, and 692

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners

v.

AUSTRAL OIL COMPANY, *et al.*,
Respondents

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner

v.

AMERADA HESS CORPORATION, *et al.*,
Respondents

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS TEXACO INC., *ET AL.*, IN OPPOSITION

Texaco Inc., *et al.* (Texaco et al.), respondents in Nos. 669, *et al.*, and conditional cross-petitioners in No. 681,

hereby submit their brief in opposition to the petitions filed in Nos. 669, 691, and 692 for writs of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on March 19, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals (Continental Appendix A, pp. 1-70) and its opinion on petitions for rehearing (Continental Appendix B, pp. 1-3) are not yet reported. The opinions and orders of the Federal Power Commission (Continental Appendices D, pp. 1-256, and E, pp. 1-112) are reported at 40 FPC 530 and 41 FPC 301. The opinion of the Hearing Examiner (III J.A. (I) 62d-447d) is reported at 40 FPC 703.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1970 (Continental Appendix C, p. 1) and was clarified by an opinion and order denying petitions for rehearing entered on June 16, 1970 (Continental Appendix B, pp. 1-3). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

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[1] Petitioners Continental Oil Company, *et al.* have filed in No. 680 Appendices to their Petition for Writ of Certiorari containing the complete text of opinions and judgment below, the agency opinions, and statutes involved. References herein to "Continental Appendix" are to that document. Petitioners Continental Oil Company, *et al.*, have also filed forty copies of the Joint Appendix in the Court of Appeals which consisted of four volumes designated as Part I and two volumes designated as Part II. A citation here to "III J.A. (I) 62d" therefore refers to Volume III of Part I, page 62d. Such page designations appear at the bottom of each page, and pages included in each of the volumes are shown in parentheses at bottom of the cover of each Volume of that Joint Appendix.

QUESTIONS PRESENTED

In light of the opinions and judgment below, Texaco *et al.*, deem all petitions for writs of certiorari in this case premature and questions raised thereby not yet ripe for review by this Court. Therefore, the questions actually raised by the petitions in Nos. 669, 691 and 692 are:

1. Whether the questions presented are ripe for review after the Court of Appeals affirmed decisions and orders of the Federal Power Commission under Section 19(b) of the Natural Gas Act, but, after a request for remand by the Commission, the court preserved all Commission powers to reconsider, rescind, or otherwise modify the decisions and orders, and the case is now pending before the Commission on motion seeking such reconsideration, rescission, and other modification?

2. Assuming *arguendo* the questions are not premature, whether after a Commission request for remand, the Court of Appeals, in the exercise of its equitable power on review under Section 19(b) of the Natural Gas Act, may affirm Commission decisions and orders but withhold finality and otherwise expressly preserve Commission authority to reconsider, rescind, or otherwise modify its decisions and orders if the Commission finds it in the public interest to do so?

3. Assuming *arguendo* the question raised in No. 692 as to Commission prescribed rates is not premature, whether substantial evidence and adequate findings support non-cost rate design adjustments made by the Commission to prescribe area rates under the method affirmed in the *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968)?

STATUTE INVOLVED

Sections 4(a), 4(e), 5(a), 16, and 19(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are involved and are reproduced at Continental Appendix F, pp. 1-8.

STATEMENT

This brief is submitted in opposition to the petitions filed by the Municipal Distributor Group (MDG), the Associated Gas Distributors (AGD), and the Public Service Commission of New York (NYPSC). Those petitioners have set forth parts of the history of the case before the Commission and the Court of Appeals. In addition, in their Conditional Cross-Petition filed in No. 681, Texaco, *et al.*, have set forth a more complete, full statement of this case which is not here repeated, but to which reference respectfully is made. Those portions of that history which are most pertinent to the questions presented in Nos. 669, 691, and 692 are:

In its March 19, 1970 opinion, the Court of Appeals had found defect after defect in the Commission decisions. On the "most serious issue" involving Commission findings and legal standards—termed "the supply problem" by the court—the Court of Appeals recognized that this Court held in *Permian* that "adequate findings" would be required in the future, but noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. The Court of Appeals also specifically found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50), and laid bare other defects in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The court also noted existence of more current data then and now available to the Commission, including the study by the Commission's Staff released in October, 1969, indicating "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). The court also found that the assessment of the crucial facts as to supply, demand, and impact of prescribed rates called for by *Permian* had not been made in this case.

Therefore, it expressed "serious misgivings about affirming the Commission" and did so only with affirmative statements that the Commission still may "set aside the present order pending further determination" (Continental Appendix A, pp. 56-57); that "affirmance" is not a "judgment that the supply problem is not serious enough to require immediate modification of the order herein sustained" (Continental Appendix A, p. 59); that "the Commission must explain the relationship between the level of service, the demand for service, and the price it sets" (Continental Appendix A, p. 68); that the "mandate" of the Court should not "be interpreted to interfere with Commission action that would change the rates" (Continental Appendix A, p. 69); that, citing Section 16 of the Act and with emphasis supplied by the Court, the Commission had power to "rescind" its orders; and that dissolution of the court's stay would be without prejudice to Commission power "to stay its own order or to take any other appropriate action affecting this case" (Continental Appendix A, p. 70).

Thereafter, petitions for rehearing by these and some of the other parties raised *inter alia*, questions of whether an "affirmance" could leave the Commission with unimpaired powers to stay, vacate, modify or rescind its orders, as contemplated by the court. The court thereupon directed the Commission to respond to the petitions and to two specific questions concerning (1) Commission authority to stay, modify or rescind an order that has been "affirmed"; and (2) equitable powers of the court to "affirm" while preserving Commission powers "to stay, modify, or rescind" any order.[2]

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[2] The full text of the questions posed by the court is:

"(1) Whether the Federal Power Commission has authority to stay, modify or rescind an order once that order has been affirmed by this Court, if circumstances appearing since the entry of the order seem to make these actions advisable.

[Footnote continued on page 6]

In response, the Commission (1) took the position that it would not "have authority to permit any retroactive increases or decreases in a rate order, unless authorized to do so by a court": (2) stated that extent of the court's "equitable powers" had not been decided, and the court had "full statutory power to authorize or instruct the Commission" to "reconsider" the record or "reopen the record" for specific purposes "without necessarily reversing the Commission and vacating the order for a new hearing"; (3) noted the need for clarification of the Court's intent to authorize "retrospective adjustments" in light of its "use of the words 'sustained in full'"; and (4) requested a "remand" so "that the Commission can discharge its regulatory responsibilities consistent with the Court's opinion."

On the basis of the petitions, responses, and the Commission request for remand, on June 16, 1970, the court entered its order denying the petitions for rehearing, but also entered an opinion stating that "affirmance of the Commission's orders is structured so as to allow the Commission great flexibility" (Continental Appendix B, p. 1). The court stated:

> "We wish to make crystal clear the authority of the Commission in this case to reopen any part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments

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[2] [Continued]

"(2) Whether this Court may, in the exercise of its equitable powers, affirm an order of the Commission while preserving the authority of the Federal Power Commission to stay, modify or rescind the order if the circumstances seem to make these actions advisable."

in this case if it finds that it is in the public interest to do so.

"At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all *other* respects, the original opinion of this Court is the *final* disposition of this appeal." (Emphasis supplied)

On July 2, 1970, the Commission entered an order staying its own orders, effective upon dissolution of the court's stay. On July 14, 1970, the Court of Appeals issued its judgment as mandate, and the Commission stay thus is and remains in effect.

Texaco, *et al.* have filed with the Commission a motion seeking (1) reopening of the proceeding, (2) consolidation with the Commission's Docket No. AR69-1 in which more current data as to natural gas demand and supply and as to related industry capital requirements has already been presented, and (3) modification of the orders reviewed below in light of the record before the Commission in the reopened proceeding.

ARGUMENT

In the Court of Appeals, Texaco *et al.* sought express reversal of the Commission on a number of substantive

issues and a remand expressly directing the Commission to set aside its orders, to receive additional evidence, and to prescribe rates on the basis of current data as to supply deficiencies and industry capital requirements. The Court of Appeals declined to grant this relief. Instead, on the basis of pleadings which included the Commission's formal request for remand, the Court of Appeals effectively withheld finality of a judgment of affirmance by express terms in its June 16, 1970 opinion to permit the Commission to reconsider its opinions and orders.

This express action by the Court of Appeals now affords opportunity to all parties below—including Petitioners MDG, AGD, and NYPSC—to be heard fully before the Commission on all substantive issues involving continued validity of the orders reviewed below, current data pertinent to Commission reconsideration, and any retrospective or prospective modification found by the Commission to be in the public interest. All substantive questions in this multi-party, multi-sided case thus are left pending before the Commission by the opinions below, and that pendency and the terms of the Court of Appeals' opinion of June 16, 1970 thus render questions now presented by MDG, AGD, and NYPSC premature.

Texaco, *et al.*, therefore oppose the granting of the petitions in Nos. 669, 691, and 692, and further show that MDG, AGD, and NYPSC also are in error in their assertions that the disposition below, as clarified by the June 16, 1970 opinion, (1) rests upon misconstruction of Section 19(b) of the Natural Gas Act, (2) conflicts with decisions of this Court and of the Courts of Appeals, (3) may generally and adversely affect administration of the Natural Gas Act, or (4) precludes disposition of this case consistent with the Act's standards and the public interest.

Texaco, *et al.*, therefore submit that the petitions in Nos. 669, 691, and 692 should be denied.

I. Questions Presented by the Petitioners in Nos. 669, 691, and 692 Are Premature

Express reversal and formal remand with explicit directions to rescind the orders on review were fully supportable in this case and would have been consistent with the record and applicable precedent.[3] However, the Court of Appeals adopted a disposition which permits the Commission, in the first instance, to reconsider its opinions and orders fully, without any such express directives from the court, and to decide what further steps, if any, are warranted.

In light of this posture of the case, all questions involving claims of aggrievement, current facts as to present and future shortages of natural gas, availability of new evidence as to changes of capital requirements, and the relationships of these facts to the specific provisions of Commission's orders on review, are left for plenary consideration by the Commission. All parties—including those who are petitioners here—can be heard before any Commission reconsideration or change of its 1968 orders. The administrative body, under the mandate of the court below, then may reconsider its orders and decide upon retrospective or prospective "adjustments in this case if it finds that it is in the public interest to do so" (Continental Appendix B, p. 2).

Neither MDG, AGD, nor NYPSC may be aggrieved by such further Commission action. Significantly, none of these parties contends that in prescribing area rates the Commission should ignore current supply evidence and its relationship to price. The opinions of the Court of Appeals and actions by the Commission to date in this case correctly recognize existence of new evidence as to na-

[3] See Conditional Cross-Petition filed by Texaco, *et al.*, in No. 681. The position of Texaco, *et al.*, as there stated, is that if the remedy fashioned by the Court of Appeals is ineffective, then the court below erred in not reversing and remanding to permit the Commission consideration intended by the Court of Appeals.

tional and area gas supply emergent between the Commission decision on September 25, 1968 and the Court of Appeals' opinion of June 16, 1970 (see Appendices to Petition of The California Company in No. 682). In the view of the Court of Appeals and as indicated by the Commission's request for remand below, this new evidence of a gas shortage and related industry capital requirements in the late 1960's, and at present, is at least sufficient to require that the Commission should have opportunity to reconsider the 1968 orders on review in this case. As detailed at pages 10-13 in the Statement in the Conditional Cross-Petition of Texaco, *et al.*, the record, this Court's teachings in *Permian*, and the new evidence also clearly signal a situation so calling for prompt Commission reconsideration, particularly of the effect which implementing the 1968 orders would have upon exploration and development capability in the Southern Louisiana area.

The Court of Appeals correctly read these signals, but concluded that the Commission, rather than a reviewing court, was the appropriate body to formulate the remedial measures required. The court stated: "The appropriate place for originally considering what parts of the orders must be reopened in light of new evidence is before the Commission" (Continental Appendix B, p. 2). The court, therefore, intended to leave no bar to Commission reassessment of its orders in light of today's supply situation and capital needs, and left all responsive steps for Commission decision in the first instance. Contrary to implications of the petitions in Nos. 669, 691, and 692, the Commission thus is left by the court with responsibility for deciding what modification, if any, is now warranted or may be found in the public interest. None is directed specifically by the court, and under the opinions below, agency findings as to what is acquired by the public interest remain a prerequisite to any new Commission action. The grant of the petitions in these cases, thereby further extending this prolonged litigation, will

frustrate and impede such prompt reconsideration required by the critical supply situation and sought by the agency itself.

Leaving aside the narrow, technical questions as to the basis for the court's disposition under Section 19 (b), discussed *infra*, the Court of Appeals' June 16, 1970 opinion is intended to leave the Commission the flexibility and capability—as sought by the Commission's request for remand—to reconsider its orders as fully as on an application for rehearing and to consider anew motions for reopening or for leave to adduce additional evidence. At this juncture, the results of Commission reconsideration and impact upon the various petitioners here necessarily are unknown. As the Court has been apprised, many of the parties are engaged in settlement negotiations, presided over by Commission counsel, with the expectation that the result will be acceptable to most, if not all, of the parties and acceptable to the Commission.[4] Absent that result, numerous other possibilities exist. In its reconsideration, the Commission may find no modification of its 1968 orders is warranted; or the Commission may find modifications in part only are justified; or as Texaco, *et al.*, believe, the Commission may find that presently known facts as to supply and capital requirements compel modifications that will be recognized as fully justified and in the public interest by most, if not all, of the parties cognizant of these facts. Regardless of present differences, future Commission action therefore can moot questions now presented.

Review at this juncture, particularly in light of the "aggrievement" requirements of Section 19(b) of the Act, thus is premature. The petitions in Nos. 669, 691, and 692, therefore, should be denied.

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[4] See Petition filed by The California Company in No. 682, pp. 12-14.

II. The Court of Appeals' Disposition under the Opinion of June 16, 1970 Was Within Its Authority under Section 19(b) of the Natural Gas Act

MDG, AGD, and NYPSC argue that the court's disposition is wholly beyond the court's authority under Section 19(b) of the Natural Gas Act (MDG Petition, pp. 19-22; AGD Petition, pp. 9-10; NYPSC Petition, pp. 17-20). However, because of the express terms of the opinion of June 16, 1970, this argument is without merit. While Texaco, *et al.*, submit that reversal and remand with express directions for rescission were and are more than warranted in this case,[5] the narrower, alternative, limited disposition on "equitable" grounds under terms of the June 16, 1970 opinion is not defective on the grounds of lack of power in a court to so limit effect of its own expressions of "affirmance" of a Commission order.

MDG, AGD, and NYPSC now argue as though there had been a final "affirmance" below without more, as though the opinion of March 19, 1970 stood as a final, unqualified "affirmance," and as though the express limits in the June 16, 1970 opinion had never been written.[6] Contrary to their arguments, however, the court did limit effect of its March 19, 1970 opinion and holdings by express terms in the June 16, 1970 opinion, clarifying its March 19, 1970 opinion and intentionally withholding any

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[5] See Conditional Cross-Petition of Texaco, *et al.* in No. 681.

[6] In this respect, the two questions stated by MDG, in particular, are not presented in this case (see MDG Petition, p. 1). MDG's first question is drawn as though the June 16, 1970 opinion, and express limits therein, had never been written by the Court of Appeals, and as though the court's holdings of June 16, 1970 rested upon a construction of Section 16 of the Act instead of Section 19(b) as expressly stated by the court. MDG's second question assumes the Court of Appeals held it has the power to fix rates "retroactively" and then has conferred this "equitable power" upon the Commission. However, there are no such holdings below. The Court of Appeals referred to its "equitable powers" as a reviewing court under Section 19(b), not to any purported judicial authority to "reverse" rates "retroactively" (*cf.* MDG Petition, p. 3).

effects of an unqualified "judgment" of "affirmance" that might have barred required, unrestricted Commission reconsideration.

This case, therefore, simply does not now present the questions as to agency or judicial powers of "rescission" under Section 16 of the Act, framed by MDG, or broadly drawn questions posed by MDG, by AGD, and by NYPSC as to general agency powers to rescind or otherwise modify an agency order which has been affirmed without such express qualifications or limitations. Section 19(b) empowers the Courts of Appeals to "affirm, modify, or set aside" a Commission order "in whole or in part," to order additional "evidence to be taken before the Commission . . . in such manner and upon such terms and conditions as to the court may seem proper"; and to enter stays of Commission orders. Significantly, in this instance, prior to entry of its June 16, 1970 opinion, the Court of Appeals had before it renewals of motions under Section 19(b) for leave to adduce additional evidence before the Commission, petitions urging that finality of an unqualified "affirmance" must be withheld, and *the Commission's* formal request for remand. Responsive to these pleadings, the Court of Appeals' opinion and orders expressly limited its "affirmance" and made provision for continuation of stay by the agency, with the results that finality of an "affirmance" without qualification did not attach, and Commission opportunity for reconsideration of the orders is preserved.

This Court has stated that authority of a Court of Appeals under a review statute similar to Section 19(b) does include "equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action." *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 373 (1939). In that instance, a remand for further proceed-

ings without reversal or setting aside of the agency order was sustained; and under similar readings, such remedies as "affirmance" coupled with express granting of motions for leave to adduce additional evidence also have been fashioned.[7] Where a reviewing court so *expressly* fashions a remedy and so *expressly* limits holdings, as in the June 16, 1970 opinion below, the ". . . great principles of equity should not yield to light inferences or doubtful construction." *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946). See also *Arkadelphia Mill Co.* v. *St. Louis S. W. R. Co.*, 249 U.S. 134 (1919); *United States* v. *Morgan*, 307 U.S. 183, 197 (1938).

A compelling sequence of events below thus led to the court's opinion of June 16, 1970, and the expression of a remedy to afford the agency, after its formal request for remand, opportunity for reconsideration. The language in the June 16, 1970 opinion also harks back to a similar early reading of Section 19(b) of the Natural Gas Act in *Natural Gas Pipeline Co. of America* v. *Federal Power Commission*, 128 F.2d 481 (7th Cir. 1942), in which the principles of the *Ford Motor Company* case were applied:

> "In this respect the legislation is similar in its terms and purport to that governing orders of the Federal Trade Commission, the National Labor Relations Board, and various other administrative bodies. We have previously said in Century Metalcraft Corporation v. Federal Trade Commission, 7 Cir., 112 F.2d 443, that, under the Federal Trade Commission Act, 15 U.S.C.A. § 41 et seq., Congress has made a grant of original jurisdiction to the court to enforce, set aside or modify the Commission's order and that such power carries with it authority to vacate or modify our own judgment whenever good cause is shown.

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[7] See *Hamilton-Brown Shoe Co.* v. *National Labor Relations Board*, 104 F.2d 49 (8th Cir. 1939); *Dolcin Corp.* v. *Federal Trade Commission*, 219 F.2d 742 (D.C. Cir. 1954), cert. den. 348 U.S. 981 (1955). See also *United States* v. *Brown*, 331 F.2d 362, 365 (10th Cir. 1964); *National Labor Relations Board* v. *Central Mercendita, Inc.*, 273 F.2d 370 (1st Cir. 1959).

> This is in accord with announcements of other jurisdictions. *We think it well settled that in respect to review of orders of Federal Boards and Commissions, the jurisdiction of the Circuit Court of Appeals, when granted by Congress, is original rather than appellate in character and that, being endowed with original jurisdiction, the court may by its own orders protect the rights of the parties in any manner in which any trial court of equity of general jurisdiction might do so in an injunction suit.*" (128 F.2d at 484, emphasis supplied)

An "affirmance" without such limits, qualifications, or other express definition by the reviewing court therefore is not presented by virtue of the opinion of June 16, 1970 in this case. While Texaco, *et al.*, submit that reversal and express directives were and remain warranted, the narrower disposition below, leaving initial decision as to corrective action to the agency, was within the Court of Appeals' prerogatives under Section 19(b). Different results compelling specific corrective Commission action are sustainable in this case, but MDG, AGD, and NYPSC clearly err in asserting that the court was without any power to so fashion the minimal remedy explicitly stated in the June 16, 1970 opinion.

III. Disposition under the June 16, 1970 Opinion Does Not Present Conflicts with Decisions of This Court or the Courts of Appeals

MDG, AGD, and NYPSC also argue that the disposition below conflicts with holdings that (1) the Commission has no powers to award reparations, and (2) filed rates effective by final or "affirmed" Commission action may not be set aside subsequently or collaterally (MDG Petition, pp. 16-17, 20; AGD Petition: pp. 9-10; NYPSC Petition, pp. 16, 19). No such conflicts with decisions of this Court or of the Courts of Appeals are presented in light of the provisions of the June 16, 1970 opinion.

It is, of course, well settled that the Commission has no "reparations" powers, and that the "filed rate" principle applies under the Natural Gas Act.[8] It is also settled that agency orders that become final as a result of unqualified judicial affirmance, or otherwise by operation of law, generally are not subject to retroactive change or collateral modification.[9] In this case, however, no conflict with these constructions or principles results by virtue of the express terms of the June 16, 1970 opinion. As shown *supra*, the rates in issue have not become "final," and "reparations" or "retroactive" ratemaking thus are not involved.[10] Beyond this, the finality of an unqualified "affirmance" did not attach by virtue of timely petitions for rehearing, and the subsequent express terms of the court in the June 16, 1970 opinion.

For these reasons, the rates in issue in this case have never become "final" filed rates or otherwise made the "legal rate" by Commission action no longer subject to Commission reconsideration under Section 19(a) or judicial review under Section 19(b), in the sense these terms are used in cases cited by MDG, AGD, and NYPSC. Neither the holdings below, nor the effect of the opinions below, nor the ultimate result contemplated by the court below, therefore is, or can be now labelled as, in conflict

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[8] As to these constructions, MDG, AGD, and NYPSC correctly cite *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9 (1968); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246 (1951); *State Corporation Commission of Kansas* v. *Federal Power Commission*, 215 F.2d 176 (8th Cir. 1954). See also *Arizona Grocery Co.* v. *Atchison, Topeka, & Santa Fe R. Co.*, 284 U.S. 370 (1932).

[9] As to these principles, MDG, AGD, and NYPSC correctly cite *International Union* v. *Eagle-Picher M. & S. Co.*, 325 U.S. 335 (1945); *Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320 (1958).

[10] By the same token, "retroactive increases" *above* the rates heretofore charged, collected, and received for past periods also are *not* involved. *Cf.* MDG Petition, pp. 16-17.

with the "filed rate" and "finality" principles set forth in decisions of this Court and the Courts of Appeals.

Asserted "conflicts" claimed by MDG, AGD, and NYPSC therefore are not existent in light of the court's express terms, precluding the result now claimed by these petitioners. The appearance of "conflict" in holdings was thereby deliberately and intentionally removed by the court below in terms qualifying its affirmance, withholding finality, and otherwise precluding any operative effect of its judgment impairing Commission reconsideration of the opinions and orders on review.

IV. NYPSC Does Not Present a Substantial Question Involving Commission Prescription of Area Rates

NYPSC sets forth a question concerning alleged "cushions" boosting the "rate of return" (NYPSC Petition, pp. 3, pp. 20-21). With all deference to fanciful language of NYPSC, the question actually pertains to a portion of the Commission opinion involving rate design which was sustained below as fully supported by substantial evidence and required findings, and as consistent with the area rate methodology affirmed by this Court in *Permian*. The question, therefore, presents no issue involving conflict with opinions of this Court, of the Court of Appeals for the District of Columbia Circuit, or of any other court; and the question does not warrant review here on any ground asserted by NYPSC.

In *Permian*, this Court sustained Commission use of "non-cost" economic factors in prescribing "area rates," particularly if there were known imperfections or other recognized deficiencies in any "cost" data used. See *Permian Basin Area Rate Cases*, 390 U.S. 747, 791, 815 (1968). These and other steps in the Commission methodology do not involve "cushions," "bonuses," or "boosts" of the "rate of return" despite NYPSC's colorful labelling. As correctly found below (Continental Appendix A, pp. 26-28, footnotes omitted):

"Even if we were to construe this case [the *Williams* case cited by NYPSC] as broadly disapproving noncost elements, the application to the sprawling, wildcatting gas producing industry of principles developed in regulating bus and telephone companies would require major adjustments. But this is not the extent of our disagreement with the argument advanced by these intervening parties. We do not understand the law of industry regulation, including the Williams case, to prohibit noncost elements that are based upon appropriate grounds. In *Permian*, the Supreme Court unequivocally stated that the FPC is not bound by the sum of cost and return even if it adopts costs as the primary basis of its calculations. The most persuasive reason for this rule is that cost pricing is circular. Past production has taken place at a given level; if a regulatory body fixes prospective prices at the cost of that production, it may be freezing the level of production, too. We think that the need for dramatically increased production from Southern Louisiana justifies the noncost factors added here, and that the FPC has power to include noncost elements that reflect its assessment of the need to use price as a tool to influence such economic relations. These are propositions that apply generally to regulation of utilities and quasi-utilities."

The court below also disposed of each of NYPSC's specific arguments by reference to the Commission's findings and the record. Repetition of the same arguments here does not present an issue differing from questions disposed of by *Permian* or now warranting another review by this Court. Review of these particular issues also would require a major re-examination by this Court of interrelated costing, rate design, and other rate of return issues decided by *Permian* [11]—an undertaking conflicting with

[11] See, *e.g.*, Questions Presented in Nos. 680, 682, 683, 684, and 685. If NYPSC's Petition were granted, petitions raising related cost, rate of return, and rate design issues also should be considered with NYPSC's question.

NYPSC's own urgings that expeditious disposition of this case is required.

V. Disposition under the Opinion of June 16, 1970 Permits a Result Consistent with the Public Interest and Commission Responsibility for Natural Gas Supply

MDG, AGD, and NYPSC argue, with differing language and emphasis, that Commission reconsideration under the Court of Appeals' opinion of June 16, 1970 necessarily is, or may produce results, contrary to the public interest and the Act's standards (MDG Petition, pp. 13-14, 20-22; AGD Petition, pp. 7-8; NYPSC Petition, 14-15, 17-20). This is not correct. Commission reconsideration and corrective action are urgently required; and in any event, the disposition below permits the responsible regulatory agency to consider the relevant facts now available and make the determinations, in the first instance, which now vitally affect current and future area and national gas supply.

Numerous documents presented below and in this Court emphasize facts reflecting a present shortage of natural gas.[12] A chain relationship is involved, requiring reference to demand, supply, exploratory efforts, capital required, and capital actually available under the Commission's 1968 orders. The court below correctly recognized that the Commission should be the body to reassess these relationships initially. The nature, size, cause, and cure for a supply shortage and for rising capital needs also were not decided by the court below. That court correctly recognized that the interests of all affected parties and the public interest will be best served if the Commission also is afforded the opportunity for reassessment of these facts before funds are paid over and passed on to AGD and MDG.

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[12] See *e.g.*, Appendices to Petition of The California Company in No. 682.

Most parties below agree and now urge this Court to permit that re-examination, even under the limited restrictions of the June 16, 1970 opinion, by denying the premature petitions for review here. It is clear that neither MDG, nor AGD, nor NYPSC can conclusively argue or show that rates or "refunds" based on findings concerning stale data, obsolete assumptions, and misconceptions of a plentiful supply are in "the public interest." The public interest in, and the Commission's responsibility for, an existent natural gas supply for consumers, as underscored in *Permian*, are inextricably intertwined, as recognized by the court below. As to the supply shortage and any related required modification of the 1968 orders, the court so declined to accept the *ipse dixit* of any of the parties as conclusive, but called for assessment by the administrative agency in the first instance. That assessment can be permitted, and is, in and of itself, a step that is in the public interest.

As to the relevant facts that now should control prescription of area rates, the court below also left these for further agency findings. Nevertheless, MDG, AGD, and NYPSC call for a pretense that economic conditions of 1956 or even 1960 now exist as to demand, supply, and capital requirements. Their arguments are presented without regard for the supply situation described by a unanimous Federal Power Commission as recently as September 18, 1970, in a decision in the *Hugoton-Anadarko Area Rate Proceeding*, FPC Docket No. AR64-1 (FPC Opinion No. 586, pp. 19-20, mimeo. ed.):

> "In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

> "All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stockpile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion."

In the present case, an area supplying up to one-third of the nation's natural gas supply is involved, and, as petitioners say, "huge sums" also are involved. The critical situation recognized below was that the public interest now calls for Commission reconsideration of the 1968 orders, and reassessment of any dissipation of funds detrimental to exploratory efforts and area and national natural gas supply. It will be only after Commission reconsideration and reassessment that any party can allege that the ultimate result is or is not in the public interest. That Commission reassessment should be permitted, rather than thwarted as sought by MDG, AGD, and NYPSC.

CONCLUSION

For the foregoing reasons, the petitions in Nos. 669, 691, and 692 should be denied; but if they are granted, then for reasons stated herein, the Conditional Cross-Petition filed by Texaco, *et al.*, in No. 681 also should be granted. Thereupon, Texaco, *et al.*, would urge that the Court summarily remand the case to the Commission with appropriate instructions to correct the errors of law set forth in the Questions Presented in No. 681. Such disposition will moot the Questions Presented in Nos. 669, 691, and 692.

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October 14, 1970

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 682, 683, 684, 685, 691, and 692

Supreme Court, U.S.
FILED
OCT 14 1970
E. ROBERT SEAVER, CLERK

Southern Louisiana Area Rate Cases

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

MOTION OF UNITED DISTRIBUTION COMPANIES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 669, 680, 682, 683, 684, 685, 691, and 692 AND BRIEF AMICUS CURIAE FOR UNITED DISTRIBUTION COMPANIES IN OPPOSITION TO CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 682, 683, 684, 685, 691, and 692

Southern Louisiana Area Rate Cases

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

MOTION OF UNITED DISTRIBUTION COMPANIES FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN RESPONSE TO PETITIONS NOS. 669, 680, 682, 683, 684, 685, 691, and 692

The following companies are herein referred to as United Distribution Companies:

AMERICAN NATURAL GAS SYSTEM
Michigan Consolidated Gas Company
Wisconsin Gas Company

CENTRAL ILLINOIS LIGHT COMPANY

CENTRAL ILLINOIS PUBLIC COMPANY

CITIZENS GAS AND COKE UTILITY

THE DAYTON POWER & LIGHT COMPANY

EQUITABLE GAS COMPANY

ILLINOIS POWER COMPANY

MICHIGAN GAS UTILITIES COMPANY

(List of Companies continued on next page)

COLUMBIA GAS SYSTEM
- Columbia Gas of Kentucky, Inc.
- Columbia Gas of Maryland, Inc.
- Columbia Gas of New York, Inc.
- Columbia Gas of Ohio, Inc.
- Columbia Gas of Pennsylvania, Inc.
- Columbia Gas of West Virginia, Inc.
- Ohio Valley Gas Company
- Virginia Gas Distribution Company

CONSOLIDATED NATURAL GAS SYSTEM
- Consolidated Gas Supply Corporation
- The East Ohio Gas Company
- The Peoples Natural Gas Company
- The River Gas Company
- West Ohio Gas Company

CONSUMERS POWER COMPANY

NATIONAL FUEL GAS SYSTEM
- Iroquois Gas Corporation
- Pennsylvania Gas Company
- United Natural Gas Company

NIAGARA MOHAWK POWER CORPORATION

NORTHERN ILLINOIS GAS COMPANY

ORANGE & ROCKLAND UTILITIES, INC.

THE PEOPLES GAS SYSTEM
- North Shore Gas Company
- The Peoples Gas Light & Coke Company

SOUTH CAROLINA ELECTRIC & GAS COMPANY

United Distribution Companies (UDC) is an *ad hoc*, voluntary group of 31 distribution utilities listed above serving approximately 10,300,000 customers at retail in the States of Illinois, Indiana, Kentucky, Maryland, Michigan, New York, Ohio, Pennsylvania, South Carolina, Virginia, and West Virginia. The principal cities and metropolitan areas wholly dependent on members of the United Distribution Companies group for their supplies of gas include Albany, Buffalo, Chicago, Cleveland, Columbus, Dayton, Detroit, Indianapolis, Milwaukee, Pittsburgh, and Syracuse. The population dependent upon the group of distribution companies is estimated to be 48,000,000 people. The United Distribution Companies Group represents approximately 25% of the gas distribution operations throughout the whole United States.

The bulk of the natural gas supplies of UDC is purchased from the major interstate pipeline companies, which in turn secure major portions of their supplies by

purchase from independent producers who operate in the *Southern Louisiana Area* and who are Respondents in the Southern Louisiana area rate cases here sought to be reviewed.

Because of the current and worsening gas shortage and of their inability to secure requisite supplies of additional gas from their pipeline suppliers, the United Distribution Companies are participating, as intervenors, in the new area rate proceeding now being conducted at Federal Power Commission Docket No. AR69-1.

Active participation in the new area rate proceedings at Docket No. AR69-1 during recent months has convinced the United Distribution Companies that the pressing supply problems facing the nation cannot adequately be dealt with and overcome solely through the prescription of higher prospective rates. Such companies are convinced that the problem can be dealt with fully and adequately only through reconsideration by the Commission of all rate and refund issues determined in its initial *Southern Louisiana Area* rate decision.

Through a brief *amicus curiae* submitted in connection with the petitions for rehearing, the UDC Companies urged the court below to remand the case to the Commission for further consideration in the light of the supply situation. While the court below affirmed the Commission, it reserved to the Commission the extraordinary power to reopen and change its order. And the issue now presented to this Honorable Court is whether this disposition by the court below should be reviewed, or whether the Commission should first be permitted to reconsider and change its rate fixing order in the light of the supply situation.

United Distribution Companies believe the views they seek to present to this court will contribute to a proper resolution of the troublesome issues before this

Court and for the benefit of the ultimate consumers for whom they seek to assure not only just and reasonable rates but also adequate supplies.

WHEREFORE, United Distribution Companies respectfully request this Court to permit them to file the brief *amicus curiae* which is submitted herewith.

Respectfully submitted,

By
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COMPANIES

October 14, 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 682, 683, 684, 685, 691, and 692

Southern Louisiana Area Rate Cases

MUNICIPAL DISTRIBUTOR GROUP, *ET AL.*,
Petitioners,

v.

FEDERAL POWER COMMISSION,
Respondent.

BRIEF AMICUS CURIAE FOR UNITED DISTRIBUTION COMPANIES IN OPPOSITION TO CERTIORARI

United Distribution Companies hereby submit their brief in opposition to the Petitions filed in Nos. 669, 680, 682, 683, 684, 685, 691, and 692 for writs of certiorari to review the judgment of the United States Court of Appeals entered in this case on March 19, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals, which is included in Continental Appendix A, pp. 1-70, and its

opinion on petitions for rehearing, which is set forth in Continental Appendix B, pp. 1-3, are not yet reported.[1] The opinions of the FPC are reported at 40 FPC 530 and 40 FPC 301. The opinion of the hearing examiner is reported at 40 FPC 703.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1970, and modified and clarified by an order denying petitions for rehearing entered on June 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether this Honorable Court should issue its Writ of Certiorari to review the action of the Court of Appeals in this most extraordinary case, where (1) the Court of Appeals affirmed the rate fixing order of the Commission reluctantly and with "misgivings" in the light of a dangerous supply situation, (2) the Court of Appeals specifically authorized the Commission, as part of the remedy of the case, to reopen its rate order and make such adjustments therein as the "public interest" may require, and (3) the Commission has not yet had an opportunity to act in the public interest pursuant to the mandate of the Court of Appeals.

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[1] In No. 680, Continental Oil Company, *et al.*, Petitioners, filed appendices to their petition containing the complete text of opinions and judgments below as well as the agency's opinions and statues involved.

STATUTE INVOLVED

Sections 4(a), 4(e), 5(a), 16 and 19(b) of the Natural Gas Act, 52 Stat. 821, as amended, 15 U.S.C. 717-717w, are involved and are reproduced at Continental Appendix F, pp. 1-8.

STATEMENT

The statement of Continental Oil Company *et al* at Docket No. 680 includes a full analysis of the decisions of the Federal Power Commission and of the Court of Appeals and for the sake of brevity we adopt that statement of the case, and make the following additional statements:

When petitions for rehearing were filed, the Court of Appeals questioning *inter alia* whether the Commission could modify the affirmed order since it does not have the power to make rates retroactively, directed the Commission to respond to questions as to whether: (a) the Commission could stay, modify, and rescind an order that had been affirmed; and (b) the Court had equitable powers to affirm while preserving the Commission's power to stay, modify, or rescind.

The Commission took the position that it would not have authority to make any retroactive increases or decreases in a rate order unless authorized to do so by the Court. It stated that the question with respect to "equitable powers" had not been decided. In conclusion, the Commission, by a 3 to 2 vote, requested the Court to remand the case so the Commission could discharge its responsibilities consistent with the Court's opinion.

On the petitions for rehearing, the Court again affirmed the order and stated:

> "We wish to make crystal clear the authority of the Commission in this case to reopen any

part of its order that circumstances require be reopened. Under section 19(b) of the Natural Gas Act, this Court has the broad remedial powers that inhere in a court of equity, and pursuant to our equitable powers we make it part of the remedy in this case that the authority of the Commission to reopen any part of its orders, including those affecting revenues from gas already delivered, is left intact. The Commission can make retrospective as well as prospective adjustments in this case if it finds that it is in the public interest to do so.

"At the same time, we emphasize that our judgment is an affirmance and not a remand. The appropriate place for originally considering what parts of the orders must be reopened in the light of new evidence is before the Commission. It may be that the Commission will decide that the refunds it has ordered are just and reasonable or at least, that their significance to the public interest is outweighed by the confusion and delay that would result from their reopening. In this event, the Commission will allow its refund orders to stand as they are. Or it may be that the refunds are too burdensome in light of new evidence to be in the public interest. In that case, it is our judgment that the Commission shall have the power and the duty to remedy the situation by changing its orders.

"In all other respects, the original opinion of this Court is the final disposition of this appeal."

Promptly after issuance of the Court's order on June 16, 1970, the Commission entered an order on July 2, 1970, staying its own orders, effective upon dissolution of the Court's stay. Such order is still in effect.

United Distribution Companies have been active in hearings before the Commission in the new *Southern Louisiana Area Rate Case*, AR69-1. Executives of the various United Distribution Companies have testified with respect to the present gas shortage. A United Distribution Companies witness from the financial community also has testified with respect to the enormous capital requirements of the energy industries if the energy requirements of this country are to be met during this decade.

United Distribution Companies propose to participate actively before the Commission in any reopening of the *Southern Louisiana Area Rate Case* here under review.

ARGUMENT

In the presence of the natural gas shortage now facing the Nation, we cannot sufficiently emphasize the importance of this case to natural gas distribution utilities, to the millions of consumers dependent upon them for utility service, and indeed to the public welfare.

The rates fixed for the Southern Louisiana Area must be adequate to provide producers with an incentive to devote immense new quantities of capital to exploration and development and bring the necessary new supplies into the interstate market. A wrong decision upon any part of this whole problem, including the ordering of unduly burdensome refunds, can have disastrous consequences for the interstate consumers.

When the hearings in the *Southern Louisiana Area Rate Case* concluded more than five years ago, hardly anyone foresaw the current gas supply shortage. Although some signs of an impending gas shortage were visible by the time the Commission issued the Opinions and Orders now under review, the full magnitude of the problem was not readily apparent.

By the time that the case reached the Court of Appeals on review, however, the situation had been somewhat clarified. *A Staff Report on National Gas Supply and Demand*, issued in September 1969, was before the Court; and the Court refers to fact that it shows: "perhaps a certainty, that the supply of gas is dangerously low" (Continental Appendix A, p. 52).

The Court of Appeals recognized that this Court held in *Permian* (*Permian Basin Area Rate Cases*, 390 US 747 (1968)) that "adequate findings" would be required in the future, but noted that the Commission had left gaps similar to the omissions criticized by this Court in *Permian*. Thus, the Court of Appeals found ". . . the Commission failed to approach supply and demand in either a semi-quantitative or qualitative way" (Continental Appendix A, pp. 49-50), and listed defect after defect in "findings" on related questions of supply, demand, and actual availability of capital to the industry at rates prescribed (Continental Appendix A, pp. 52-69). The court also noted existence of more current data available to the Commission, including the study by the Commission's Staff released in September, 1969, which indicates "perhaps a certainty, that the supply of gas is dangerously low" and "a serious shortage, in fact, may already be unavoidable" (Continental Appendix A, p. 52). In sum, the court found that the assessment of the crucial facts as to supply, demand, and impact of prescribed rates called for by *Permian* had not been made in this case.

The Natural Gas Act, in addition to obligating the Commission to fix "just and reasonable" rates, requires that rates be fixed at levels consistent with the maintenance of an adequate level of service. *Atlantic Refining Co. v. Public Service Commission of New York*, 360 U.S. 378 (1959). The Commission, thus, has a duty to set rates at levels which will obtain the gas needed by interstate consumers. But, it is apparent that the ceiling prices established for the Southern Louisiana Area are inadequate to meet the projected demands. Higher prices will play a vital role in encouraging producers to search for, develop and produce new reserves and in inducing them to dedicate such reserves to the interstate marketplace. Conversely, price "rollbacks" and unduly burdensome refunds will discourage these activities by drawing off capital badly needed for the expansion of exploration and production.

If the rates fixed under Opinion Nos. 546 and 546-A are placed into effect, it is estimated that the producers will be required immediately to refund $375 million at a time when capital is scarce and expensive.[2] To impose such an obligation on the producing industry would drastically reduce the already limited amount of new capital needed to finance new exploratory ventures and would accentuate the present shortages.

The opinions of the Court of Appeals are shot through with expressions of concern over the worsening supply situation and over the probability that the ordered rates and refunds will not provoke its correction. Plainly, the court concluded that further Commission action, through the application of its expertise to the

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[2] The Commission order was based primarily on 1960 data and did not give material recognition to the inflation of the 1960s. The gas requirements of the 1970s cannot be met at the revenue levels of the late 1950s.

developed demand and supply problem, is the best and most effective manner of responding to the situation in the public interest.

Plainly, also the Commission, in the light of the Staff Report and other data now available, shares this deep concern and desires to act, for it requested a remand of the case.

In our opinion, further action by the Commission, well grounded on proper findings as to the supply and demand problem, and as to the bearing of rates and refunds upon its solution, is essential in the public interest; and, until such action is taken, we believe that further review of the case is premature.

WHEREFORE United Distribution Companies respectfully suggest that the public interest will be best served if this Honorable Court denies the Petitions for Writs of Certiorari presented herein.

Respectfully submitted,

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October 14, 1970

CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed a copy of the within Motion and Brief *Amicus Curiae* to the Federal Power Commission and to each of the Petitioners for Writs of Certiorari in the above dockets.

C. William Cooper

October 14, 1970

In the Supreme Court of the United States

OCTOBER TERM, 1970

Supreme Court, U.S.
FILED
OCT 14 1970
CLERK

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner,

vs.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

vs.

AUSTRAL OIL COMPANY, *et al.*,
Respondents.

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

vs.

AMERADA HESS CORPORATION, *et al.*,
Respondents.

Brief for Respondent The California Company, a Division of Chevron Oil Company, in Opposition

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In the Supreme Court of the United States

OCTOBER TERM, 1970

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Brief for Respondent The California Company, a Division of Chevron Oil Company, in Opposition

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The California Company, a division of Chevron Oil Company, petitioner in No. 682, respectfully submits this brief in opposition to the petitions for writs of certiorari in the above-entitled cases.

ADDITIONAL STATEMENT OF FACTS

At pages 4-12 of our petition for a writ of certiorari herein (No. 682), and in the appendix to that petition, we set out the facts concerning the present critical gas shortage, the deficiencies in the findings of the Commission pointed out by the court below and the facts, relevant to review by this Court, which have occurred since the decisions of the Commission and of the court below. We respectfully re-emphasize those facts and call the Court's attention to additional relevant events which have occurred since the filing of our petition:

1. On September 18, 1970, the Commission issued its Opinion and Order Determining Just and Reasonable Rates for Natural Gas Produced in the Hugoton-Anadarko Area.[1] A copy of this Opinion and Order is printed in Appendix A to this petition.[2] This decision of the Commission is particularly significant for the following reasons:

(a) The Opinion and Order recognized that the administrative proceedings in the instant case are incomplete and that the Commission has been charged by the Court of Appeals in this case with determining just and reasonable rates which will elicit the required level of supply of gas:

> "In *Southern Louisiana Area Rate Cases*, ...F. 2d ....., the Court of Appeals for the Fifth Circuit stressed the need for the Commission to review its cost computations in the light of demand, supply and the effect of the prices established" (App. A 6).
>
> "In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the

1. The Hugoton-Anadarko Area is a large gas producing area in Kansas, Oklahoma and Texas.

2. References to the appendices hereto are abbreviated herein as follows: "App. A ...." or "App. B ...."

desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission" (App. A 23).

(b) The Opinion and Order re-emphasized the serious gas supply situation which the Court of Appeals held had been given inadequate—indeed, no—consideration by the Commission in this case:

"All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stock-pile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion" (App. A 23).

"The evidence shows that the demand for gas has risen beyond all expectations of a few years ago and that it will rise within a few years to a level that will strain or even exceed the capacity of the industry to meet" (App. A 25).

(c) The Opinion and Order refers to the comments of the Court of Appeals in this case concerning an earlier settlement proposal herein which was rejected by the Commission:

"The Court of Appeals also dealt with the settlement offer rejected by the Commission in Southern Louisiana, and Commissioner Carver's dissent advocating the adoption of that settlement proposal as being within the 'zone of reasonableness':

> "'In light of the imprecision of costs, broad support for the settlement, evidence that the market has at least a procompetitive structure, and cumbersome nature of price regulation, it may be that the settlement arguments advanced by Commissioner Carver are persuasive. In this case, the settlement is championed by the producers, and before the Commission it was supported by gas distributors (whom we classify as representing consumer interests) accounting for over 87 percent of delivery volume .... Widespread use of the settlement technique would result in negotiation pitting market forces against each other on an aggregate scale, overseen by the Commission.'" (App. A 6-7).[3]

(d) The Opinion and Order, after careful consideration of the merits and appropriate findings based on the record, effectuated a settlement proposal agreed to by a majority of the parties, despite the opposition of two municipalities, a State Commission and a municipal distributor group (App. A 2). The Opinion and Order terminated area rate proceedings which had extended over more than six years. The Commission found:

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3. This quotation by the Commission from the opinion of the Court of Appeals appears in the footnote at page 46 of Appendix A to the petition in No. 680 by Continental Oil Company, et al. References to the appendices to that petition are abbreviated herein as follows: "Cont.App. ...." or "Cont.App. B ....."

"Having examined each provision of the proposed settlement upon its merits, we find that the proposal as a whole is in the public interest, and should be made the order of this Commission. It is fair to the consuming public, and will promote certainty and stability and reduce administrative burdens by reduction of contested issues. Adoption of the proposal will contribute to obtaining additional supplies of gas from this crucial area, and contribute to cooperation in the attempt to deal with the problems of gas supply. For all these reasons, the settlement proposal should be adopted" (App. A 22-23).

2. On September 29, 1970, the Commission handed down its Opinion and Order on Rehearing in the Texas Eastern Transmission Corporation Case (Opinion No. 565A).[4] That case involves a sale of gas from the Southern Louisiana area which was not consolidated in the instant proceedings. In its Opinion and Order the Commission recognized that the administrative proceedings in the case at bar are incomplete and held that "the just and reasonable rates which ultimately flow out of any settlement, or further proceedings in AR 61-2, or AR 69-1, should govern the level of payments in this case prior to October 1, 1968, as well as after that date" (App. B 2).

3. In our petition for a writ of certiorari in No. 682, we pointed out (p. 13, n. 15) that further settlement discussions in the case at bar were scheduled for September 14, the day our petition was filed. Those discussions, under the chairmanship of a representative of the Commission and participated in by all interest groups—producers, pipelines, distributors, state commissions and the Commission's Staff—continued throughout the week of September 14.

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4. The pertinent excerpt from that opinion is printed in Appendix B to this petition.

After a short recess, they were resumed on September 29. On October 2, a substantial number of the parties, including the Commission's Staff, reached agreement in principle on the major issues under consideration, including, specifically, Southern Louisiana area rates to be effective both before and after October 1, 1968, and the amount and disposition of refunds. The most significant features of the agreement are provisions designed to stimulate discovery of new reserves. The proposed order would provide incentives for the discovery and dedication of new gas to the interstate market, both by providing a credit against refunds to producers for new gas which the producers commit to the interstate market and by an increase in rates which the industry can realize only when it shall have discovered and dedicated a fixed amount of substantial new reserves. A drafting committee under the chairmanship of a member of the Commission's Staff, and composed of representatives of all the interest groups, met on October 7 and 8. They are scheduled to meet again on October 15, and hopefully, shortly thereafter, will have drafted a final settlement agreement for submission to the Commission for its consideration and review.

ARGUMENT

I

We respectfully submit that the petitions of the Municipal Distributor Group, the Associated Gas Distributors and the Public Service Commission of the State of New York, Nos. 669, 691 and 692, respectively, are without merit. Each of these petitions questions the power of the court below to include in its judgment a provision that the Commission shall have power to reopen its orders and to make such new

orders as it deems in the public interest, taking into consideration the admonitions of the Court of Appeals and the new evidence relating to the critical gas shortage.

The question thus presented, we submit, is not substantial.

Each petitioner in Nos. 669, 691 and 692 argues the case as though it presented the question whether the Commission has power, after an unqualified affirmance of a rate order by a Court of Appeals, thereafter to change the rates so fixed and so affirmed. No such question is here presented. The court below provided that under its "judgment" the Commission "shall have the power and the duty to remedy the situation by changing its orders,"[5] and further provided that "Our affirmance of the Commission's orders is structured so as to allow the Commission great flexibility in dealing with this problem [the gas supply shortage],"[6] and that a "part of the remedy in this case"[7] is that the Commission shall have the authority "to reopen any part of its orders, including those affecting revenues from gas already delivered."[8] No one of the authorities cited in the petitions in Nos. 669, 691 and 692 has any relevance to this situation. The Court's power to enter such a judgment, and the Commission's power to act responsively to that judgment, is demonstrated in the brief for Texaco, Inc., et al., and the brief of Humble Oil and Refining Company, both of which are being filed herein in opposition to the petitions in Nos. 669, 691 and 692. We adopt the argument on this point in those two briefs.

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5. Cont. App. B 3.
6. Cont. App. B 1.
7. Cont. App. B 2.
8. Cont. App. B 2.

II

Many of the parties to the petitions and cross petitions in this case have submitted that the appropriate procedure for this Court to take at this premature stage of the proceedings is to deny all petitions for writs of certiorari. We agree that review by this Court of any part of the decision of the court below clearly is premature at this time. The administrative process has not been completed. The events related in our petition for a writ of certiorari, and in the statement of additional facts set forth above, indicate that a further order of the Commission in these proceedings, establishing just and reasonable rates for the past and for the future, will be entered. This order will give effect to the agreement of the parties thereto insofar as the agreement shall propose rates which the Commission finds are just and reasonable. In this regard, it is important to bear in mind that the Commission and its Staff have before them voluminous current evidence on both costs and supply in the proceeding it instituted in 1969 (AR 69-1) and which is companion to the proceedings in this case.

Following the issuance of the new order, most of the issues now presented on this vast record—which so deeply concerned the court below and which were treated at length in its 70-page opinion—undoubtedly will have disappeared from the case. The issues contested on the new record, if any, undoubtedly will be different or much more narrow. Further, the intermediate appeal, if any, from that order to the Court of Appeals may resolve all such issues and, in any event, will give this Court the benefit of the consideration of the new issues by the court below.

In these circumstances, it is understandable that many parties contend that all petitions for writs of certiorari should be denied. Nevertheless, we submit that the disposi-

tion of the case suggested in our petition for a writ of certiorari (No. 682) is the appropriate action for this Court to take. Thus far, the Commission has not yet entered an order, as prayed by this petitioner and others, reopening the proceedings in this case. While the settlement proposal gives every practical assurance that a new order will be entered, particularly in view of the leadership of the Commission's Staff in achieving an agreement, it is still *possible* for the Commission, under the judgment of the court below, to take no further action. This would be contrary to law and catastrophic to gas consumers and the gas industry. Since, on this unusual record, this possibility still exists, we submit that the appropriate action for this Court to take is to grant all petitions for writs of certiorari and summarily remand the case to the court below, with instructions to that court to supplement its judgment by directing the Commission to reopen the case and proceed to such orders as it deems in the public interest. Such disposition of the case will preserve to each party its right to have reviewed by the Court of Appeals or by this Court any question now presented, either on this record or, if still relevant, on the expanded record upon which the new order is based.

Of course, if prior to this Court's action on the petitions for writs of certiorari herein, the Commission should enter order reopening these proceedings, then, we would submit,

the appropriate action for this Court would be to deny all petitions for writs of certiorari at this premature stage of the case.

Dated: October 14, 1970.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The within brief in opposition has been served in accordance with Rule 33 by mailing three (3) copies thereof, air mail, postage prepaid, to all counsel of record and to the Solicitor General of the United States this 13th day of October, 1970.

An Attorney for Respondent

(Appendices Follow)

APPENDIX A

United States of America
Federal Power Commission

Before Commissioners: John N. Nassikas, Chairman; Lawrence J. O'Connor, Jr., Carl E. Bagge, John A. Carver, Jr., and Albert B. Brooke, Jr.

Area Rate Proceeding, *et al.*	Docket Nos.
(Hugoton-Anadarko Area)	AR64-1, *et al.*

OPINION NO. 586

OPINION AND ORDER DETERMINING JUST AND REASONABLE RATES FOR NATURAL GAS PRODUCED IN THE HUGOTON-ANADARKO AREA

(Issued September 18, 1970)

Nassikas, Chairman:

1. By its order of November 27, 1963, 30 FPC 1354, 28 Fed. Reg. 12645, the Commission undertook to determine the just and reasonable prices for gas sold in interstate commerce by independent producers of natural gas from the Hugoton-Anadarko area. After hearings held jointly in this proceeding and in *Texas Gulf Coast Area Rate Proceeding*, AR64-2, a proposed initial decision by Presiding Examiner Max L. Kane was issued on September 16, 1968. Exceptions were filed by participants listed in Appendix A to this Opinion and Order.

2. On May 24, 1968, a "settlement" proposal was filed by a group of producers. Opposition to this proposal was filed by the Public Utilities Commission and State of California (California), a group of California distributors and the cities of Chicago, Los Angeles, San Francisco, and Denver

and the Public Service Commission of the State of Colorado. On October 31, 1969, the Commission heard joint oral argument in this proceeding and the *Texas Gulf Coast Area Rate Proceeding*. On January 29, 1970, after extended settlement conferences, a new settlement proposal was filed, formally opposed only by California,[1] Chicago and Denver. American Public Gas Association, an association of approximately 200 municipal distributors, joined in Denver's opposition.[2]

The Initial Decision

3. The initial decision was issued prior to our Opinions and Orders in the *Southern Louisiana Area Rate Proceeding*, 40 FPC 530, 41 FPC ..... Examiner Kane ably summarized the evidence concerning characteristics of the Hugoton-Anadarko area, where gas is divided between the ancient, shallow, low-pressure Hugoton-Panhandle Field and the so-called Other Fields, which are newer, deeper and of higher pressure than the Hugoton-Panhandle Field. The initial decision established one set of prices for "new gas" from all fields and "old gas" from the Other Fields and another set of prices for "old gas" from the Hugoton-Panhandle Field.[3]

4. Base area rates for new gas and old Other Field gas (at 14.65 psia) at the wellhead were fixed by Examiner Kane

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1. California consumers are concerned with between seven and nine percent of the gas sold in the interstate market in the Hugoton-Anadarko area.

2. The American Public Gas Association had filed neither exceptions nor answers to exceptions and had not participated to any extent in the hearings, although it was a formal intervenor.

3. "New gas" is gas-well gas, or residue gas derived therefrom sold under contracts dated on or after January 1, 1961; "old gas" is gas-well gas sold under contracts dated before January 1, 1961, or residue gas derived therefrom, and all casinghead gas or residue gas derived therefrom regardless of the date of the contract.

at 17.5 cents per Mcf in Texas Railroad District No. 10, 17.1 cents per Mcf in Oklahoma, and 16.3 cents per Mcf in Kansas. The base area rate for old gas from the Hugoton-Panhandle Field (at 14.65 psia) at the wellhead was 12.1 cents per Mcf in Texas District No. 10, 11.9 cents per Mcf in Oklahoma and 11.3 cents per Mcf in Kansas. Under the initial decision, a gathering charge was allowed, one cent for gas from the Other Fields in Texas District No. 10, 1.1 cent from the Other Fields in Oklahoma and Kansas, and 1.9 cent for gas from the Hugoton-Panhandle Field in all three states.

5. Quality and delivery pressure standards were established and a minimum rate was set. A moratorium of 2½ years was imposed, and refunds (plus interest) were ordered of all amounts collected in excess of the applicable area rates and subject to refund in consolidated Section 4(e) cases, such refunds however, to be retained or escrowed by the producer until suitable flow-through arrangements were approved.

The Settlement Proposal

6. The settlement proposal of January 29, 1970, was joined in by 27 independent gas producers.[4] The proposal is appended to this order as Appendix B. On February 3, 1970, the Commission noticed the proposal and provided for the filing of comments or objections by March 2, 1970 (35 Fed. Reg. 2753). Statements of support were received from twelve producers, Texas Independent Producers & Royalty Owners Association (TIPRO), Oklahoma Independent Petroleum Association (OIPA), seven pipelines

4. All participants were represented at one or more of the settlement conferences except California, Los Angeles and San Francisco.

(purchasers of 91.26 percent of the gas sold in the area subject to our jurisdiction),[5] the Northern Distributor Group[6] and Northern Illinois Gas Company (distributor to over a million customers in Illinois, including suburbs of Chicago). The producers proposing and supporting the settlement were responsible for 71.2 percent of the gas sold to interstate pipeline companies in 1968 in the Hugoton-Anadarko area (87.8 percent in the Panhandle-Hugoton Field and 55.9 percent in the Other Fields).[7] No producer or pipeline opposed the proposed settlement, although Cities Service Gas Company contended three rate schedules should not be included for reasons peculiar to those sales.

7. Opponents of the original settlement who did not oppose the amended settlement included the California Distributor Group, Los Angeles, San Francisco, and the Public Service Commission of Colorado.

Specific Objections to the Settlement Proposal

8. Chicago opposed the settlement proposal as lacking record support for the proposed rates. Denver-APGA made the same objection and urged additionally that it "would

5. Northern Natural Gas Company, Transwestern Pipeline Company Colorado Interstate Gas Company, Cities Service Gas Company, Panhandle Eastern Pipe Line Company, Michigan Wisconsin Pipe Line Company and Natural Gas Pipeline Company of America. See Appendix C.

6. Central Natural Gas Company, Central Telephone & Utilities Corporation (formerly Western Power & Gas Company), Iowa Electric Light & Power Company, Iowa-Illinois Gas & Electric Company, Iowa Power and Light Company, Iowa Public Service Company, Metropolitan Utilities District of Omaha, Minneapolis Gas Company, Northern States Power Company (Minnesota), Northern States Power Company (Wisconsin) and Northwestern Public Service Company, all of which are Upper Midwest distributors.

7. These producers and their 1968 jurisdictional sales are listed in Appendix E.

grant the producers 1.2 to 3 cents per Mcf in excess of a just and reasonable rate", that the elimination of all refunds prior to 1961 and of thirty percent of the refunds for 1961 and 1962 was not justified, and that the provision for a one cent ceiling rate escalation July 1, 1972, would make the moratorium "anti-consumer."

9. California objected to the absence of specific quality standards from the settlement proposal (except for gas under contracts dated on or after November 1, 1969), the higher price allowed gathered gas, and said the settlement rates "do not appear to be capable of being justified in terms of costs incurred, including an allowance for a fair rate of return" (p. 12). California also objected to the failure to require full refunds and to "future price escalation . . . without regulatory scrutiny. . . ." California contended also that the Commission lacks authority to approve a settlement proposal when opposition is filed to it, but must instead decide the case upon the merits.

10. In its *Permian* decision,[8] the Supreme Court stated:

> ". . . Area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequences; it is entirely possible that the Commission may later find that its area rate structure for the Permian Basin requires significant modification."
>
> * * *
>
> "We assume that the Commission will continue to examine both the premises of its regulatory methods and the consequences for the industry's future of its rate making orders."
>
> * * *

8. 390 U.S. 747 (1968).

"We do not suggest that the Commission need not continuously evaluate the revenue and other consequences of its area rate structures. A principal advantage of area rate regulation is that it centers attention upon the industry's aggregate problems, and we may expect that, as the Commission's experience with area rate regulation lengthens, it will treat these important questions more precisely and efficaciously."

* * *

"'The Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about the prospective responses of the capital market; it is instead obliged at each step of its regulatory process to assess the broad requirements of the broad public interests entrusted to its protection by Congress. Accordingly, the 'end result' of the Commission's orders must be measured as much by the success with which they protect those interests as by the effectiveness with which they 'maintain . . . credit and . . . attract capital.'"

* * *

". . . we see no objection to [the Commission's] use of a varity of regulatory methods. Provided only that they do not together produce arbitrary or unreasonable consequences, the Commission may employ any 'formula or combination of formulas' it wishes, and is free 'to make the pragmatic adjustments which may be called for by particular circumstances.'"

* * *

11. In *Southern Louisiana Area Rate Cases*, ... F.2d ....., the Court of Appeals for the Fifth Circuit stressed the need for the Commission to review its cost computations in the light of demand, supply and the effect of the prices established. The Court of Appeals also dealt with the

settlement offer rejected by the Commission in Southern Louisiana, and Commissioner Carver's dissent advocating the adoption of that settlement proposal as being within the "zone of reasonableness":

> "In light of the imprecision of costs, broad support for the settlement, evidence that the market has at least a procompetitive structure, and cumbersome nature of price regulation, it may be that the settlement arguments advanced by Commissioner Carver are persuasive. In this case, the settlement is championed by the producers, and before the Commission it was supported by gas distributors (whom we classify as representing consumer interests) accounting for over 87 percent of delivery volume . . . . Widespread use of the settlement technique would result in negotiation pitting market forces against each other on an aggregate scale, overseen by the Commission."

12. In *Michigan Consolidated Gas Company, et al. v. F.P.C.*, 283 F.2d 204 (CADC, 1960), cert. denied, 364 U.S. ....., where the Commission had refused to consider a proposed settlement because of objection by one of the principal parties, the court remanded the case and required the Commission to consider the proposed settlement on its merits. The court said:

> "Even assuming that under the Commission's rules Panhandle's rejection of the settlement rendered the proposal ineffective *as a settlement*, it could not, and we believe should not, have precluded the Commission from considering the proposal *on its merits*. Indeed, the proposal appears prima facie to have merit enough to have required the Commission at some stage of the proceeding to consider it on its own initiative as an alternative to total abandonment.

* * *

"Of course, there may be valid objections to the settlement proposal which the Commission has not explained, or which a hearing upon the proposal would reveal. Such considerations may merit modification or total rejection of the proposal. But we think that, since the Commission is charged with the duty of protecting the ultimate consumer from 'exploitation at the hands of natural gas companies,' Federal Power Commission v. Hope Natural Gas, 1944, 320 U.S. 591, 610, 64 S.Ct. 281, 88 L.Ed. 333, it cannot refuse *to consider* a proposal which appears, on its face at least, consistent with that duty." (p. 224)

13. The Commission not only has discretion to give full consideration to a proposed settlement but also a legal obligation to do so.[9]

14. A settlement proposal by virtually all of the area's producers, supported by the pipelines and the distributors conveying the greater part of the interstate gas from the area, commands attention. A resolution of the issues which so many parties are willing to accept reduces the possibility

9. See also *Cities of Lexington, etc., Ky. v. F.P.C.*, 295 F.2d 109, (CA4, 1961), where the court upheld approval by this Commission of a settlement despite the objection of Lynchburg Gas Company. That company appealed, contending the Commission could not approve the settlement over its objection, but was compelled to decide the case on the merits. The court said:

"There is nothing in the Administrative Procedure Act which expressly requires unanimous consent of all the participating parties to an agreement of settlement; and to read such a contention into the statute in view of the countless state agencies, municipalities and consumers who may be interested in an administrative proceeding would effectually destroy the settlement provision. In this instance the kind of interest which Lynchburg entered the proceeding to represent was protected by the participation and consent of other parties in like situation. Their consent to the settlement was sufficient basis for the Commission's approval." (p. 121)

of future litigation. Of course the settlement proposal must be considered upon its merits, in the light of existing conditions, but this is quite different from California's insistence that we must ignore the settlement and take up the case on its merits as reflected in a voluminous record of raw evidence.

The Rate Structure

15. The initial decision and the settlement proposal provide one set of base area rates for gas from the Hugoton-Panhandle Field and a separate set of higher area base rates for gas from the Other Fields. The settlement proposal provides for a higher area base rate for gas-well gas under contracts executed on or after November 1, 1969. On the merits, we approve these principles.

16. The settlement proposal provides for the same treatment for casinghead gas in the Hugoton-Anadarko area as that provided in Permian and Southern Louisiana, namely pricing it the same as gas well gas of the first vintage. However, a proviso is inserted that if our earlier determination to this effect in *Southern Louisiana* should be modified, equivalent treatment would be expected. This qualification is reasonable and appropriate for adoption here.

Date of Division

17. In the *Southern Louisiana Area Rate Proceeding*, the Commission said:

> ". . . The use of the same division date as was used in the Permian Basin will ensure equality of treatment in this respect among producers operating in different pricing areas—a producer should not be penalized by having a later division date exclude its gas from the new gas category solely because he chanced to be in one area rather than another, unless strong and suffi-

cient reasons are shown for the different treatment. Multiplicity of division dates throughout the various areas would complicate the administrative structure of gas prices." *Southern Louisiana Area Rate Proceeding*, 40 FPC 530, 555 (1968), modified in other respects and confirmed, 41 FPC 301, rehearing denied 41 FPC 616 (1969), affirmed ___ F. 2d ___ (CA5, 1970).

The quoted reasoning applies with equal force here, and in the absence of the amended settlement proposal we would establish October 1, 1968, as the date of division between earlier and later vintages of gas in this proceeding. The settlement proposal's use of November 1, 1969, as the date of division, makes contracts executed in the 13 month interim from October 1, 1968, through November 1, 1969, subject to a base area rate 1.5 cents per Mcf lower than if the date of division were October 1, 1968. An examination of the contracts filed with the Commission and the estimated annual volumes moving thereunder indicates that by our approving the later division date provided in the amended settlement proposal there will be a saving to consumers of approximately seven million dollars during the period of the moratorium provided in the settlement proposal.

The Wellhead Prices of Other Field Gas Under Contract Before November 1, 1969

18. In the initial decision detailed computations were made of the nationwide cost of new gas and of the historical cost of Other Field gas in the Hugoton-Anadarko area. The two computations gave approximately the same result. The initial decision therefore established one basic price for all Other Field gas, varied only by the tax differences in the different states: 16.3 cents in Kansas, 17.1 cents in Okla-

24. We do not reach our determination, however, upon a consideration of costs alone. The proposed later vintage prices are approved also as a means of encouraging exploration for and development of additional supplies of gas.

25. The central location of this area makes the discovery and development of its gas particularly desirable. Many of the largest pipelines are largely dependent upon the Hugoton-Anadarko area for major portions of their gas supplies. Gas which is made available in this area can be delivered to major markets with a minimum of delay. To major mid-west cities it is vital, and to other widely divergent parts of the country it is scarcely less important. The prices proposed may not solve the gas supply problem, but it is reasonable to expect that prices proposed by the industry itself will assist in moderating supply difficulties. The rate stability here provided will be beneficial to all segments of the industry and to consumers as well.

The Wellhead Prices for Hugoton Panhandle Field Gas

26. A direct computation of the historic cost of Hugoton-Panhandle Field gas well gas cannot be derived from the evidence of record in this proceeding. It is possible to determine, however, that Hugoton-Panhandle Field gas is less costly than Other Field gas well gas.

27. Despite the apparently lower costs, the evidence on the development of this field discloses that expensive well replacement programs have become necessary in recent years. The delivery pressure, originally at 440 psig, has been declining over the years and the necessity for compressor installation is becoming more common. Salt water disposal has become an increasing problem in recent years and has contributed to increasing costs.

28. The adoption of the proposed settlement rates will encourage the continuation of these programs and prolong the economic life of the field, which is the largest single accumulation of gas in this country, and the backbone of supply from the Hugoton-Anadarko area. We have previously accepted a 12.5 cents per Mcf rate in the Kansas portion of this field under individual company settlements—the same rate as now proposed. For these reasons, we find the proposed settlement prices for Hugoton-Panhandle gas to be just and reasonable, and in the public interest.

Proposed Price Escalation of January 1, 1972

29. The proposed settlement provides that all area rates will be increased by one cent per Mcf on January 1, 1972. We find that this escalation is justified by the increased rate of return which we find should be allowed all vintages of gas.

30. Changes in the economic climate—evidenced, for example, by persistent inflationary trends in the general economy and unusual liquidity pressures on corporate enterprises—have made it apparent that the 12 percent rate of return found adequate by the Commission in 1965 (*Permian*) and 1968 (*Southern Louisiana*) should be adjusted upward. Compared with prime rates of 6 percent to 6¾ percent charged by commercial banks during 1968, the prime rate was raised to 8½ percent in June 1969 and has been at 8 percent since March 1970. Bond interest rates have experienced similar and at times much sharper increases as a result of continued heavy demands for long-term financing.

31. Accordingly, we find that the proposed escalation in rates is just and reasonable in view of the increased rate of return which should be allowed producers from 1969 on-

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31. Accordingly, we find that the proposed escalation in rates is just and reasonable in view of the increased rate of return which should be allowed producers from 1969 on-

wards. The delay of the escalation to July 1, 1972, under the settlement proposal is a provision favorable to consumers.

32. So far as gas under contracts dated on or after November 1, 1969, is concerned we also find that the proposed one cent price escalation is necessary and proper to provide additional incentives to find and commit to interstate commerce the particularly valuable gas from this vital supply area.

Substantial Off-Lease Gathering

33. The settlement proposal would provide for a one-cent gathering charge to be added to the wellhead price for Other Field gas that has had substantial gathering by the producer off the lease, a two cents gathering charge for Hugoton-Panhandle Field gas prior to July 1, 1972, and 2.5 cents thereafter. This compares with the Examiner's one-cent gathering allowance for Other Field gas in Texas, 1.1 cent for other field gas in Kansas and Oklahoma, and 1.9 cent for Hugoton-Panhandle gas in all three states.

34. The principal objection to this was advanced by California. California contends that there should be no allowance for gathering at all, arguing that gathering is primarily for the purpose of processing the gas to obtain its liquids, and gathering costs should be ascribed to the liquids rather than to the residue gas.

35. In *Permian* we accepted California's view, but the circumstances were different. In the Permian Basin, two-thirds of the gas produced was casinghead gas, collected to be stripped of its liquids before the residue gas was sold. Gas-well gas in that area was of high pressure; gathering it was not necessary for compression. The principal costs of the gathering systems were attributable to casinghead gas, and therefore were not properly included in gas-well gas costs.

36. In *Southern Louisiana*, we recognized that the cost of such gathering of gas should be included in computing the producers' cost of gas well gas, which predominated.

37. Gas well gas also predominates in the Hugoton-Anadarko area. The situation resembles that in *Southern Louisiana* and we find that additional compensation for substantial off lease gathering is proper since the amount of gathering allowance in the settlement proposal closely approximates the Examiner's determinations. The increase in gathering allowance for Hugoton Panhandle gas in 1972 is just and reasonable because of the declining pressure in the Hugoton Panhandle Field, which will increase the cost of gathering and compressing. The increased price will also be an incentive to continued production after the wellhead pressure in the field has been reduced.

38. To the settlement proposal were attached, as Exhibits A-1 and A-2, lists of deliveries nominated for the gathering allowance. We are unable to determine the facts with respect to all these deliveries from the information before us in our files, and with respect to other deliveries which may qualify for the gathering allowance even though they were not included in the lists. Information to establish the pertinent qualifying facts must be furnished either before or at the time of filing the applicable rate schedules, or amendments thereto, in compliance with our present Order if the gathering allowance is to be applicable. In those instances where deliveries were nominated for the gathering allowance, or are hereafter nominated, that portion of any rate or charge attributable to such gathering allowance, and made effective pursuant to the Order herein, shall be charged and collected subject to refund pending the Commission's determination whether such gathering allowance is, in fact, applicable.

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further considered. The effect of the settlement proposal with respect to dehydration, compression and removal of carbon dioxide, although favorable to the producers, is offset by the fact that the settlement proposal will cost the producers a loss of upward Btu adjustments.

Minimum Rates

46. Under the proposed minimum rates the gas involved will still be most favorably priced from the point of view of buyer and consumer. We find that the proposed minimum rates are not unreasonable, and that they are in the public interest. See *Permian, supra.*

Moratorium

47. The settlement provides for a moratorium on rate increases above the applicable area rates until July 1, 1977. A principal benefit of the settlement proposal is the extended period of relative certainty that it provides, creating an atmosphere of rate stability. While changed circumstances may compel the reopening of some of the matters here determined, we believe a settlement proposed by a large part of the industry and accepted by all of it is less liable to be subjected to constant pressure for change than would a Commission determination imposed without consent. We find that the moratorium provision of the settlement proposal is in the public interest.

Refunds

48. The settlement proposal departs from the pattern of previous decided cases by providing for a lesser refund obligation than that which would follow from a strict application of theory. Collections subject to refund and in excess

of the proposed settlement rates agreed upon for contracts in effect prior to 1961 would not be required to be refunded. Seventy percent of such amounts collected in 1961 and 1962 would be refundable, and 100 percent of the amounts collected after 1962.[11] This provision reflects the peculiar situation of Phillips Petroleum Company.

49. After the Supreme Court's decision in the *First Phillips* case, the Commission reinstated its proceedings and instituted separate investigations of the rates of a number of other major producers. The Commission's decision of September 28, 1960, in the remanded *Phillips* proceeding determined that individual company regulation was not feasible and that producer regulation should be accomplished on an area basis, 24 FPC 437, 547. The Commission also found that, based on a 1954 test year, Phillips' costs were $10,000,000 in excess of its revenues, 24 FPC 537, 576. While expressing the view that Phillips costs probably exceeded its revenues at least through 1958, and that a great many of its unconsolidated Section 4(e) proceedings should be terminated, the Commission terminated only the consolidated 4(e) proceedings, except two involving spiral escalation clauses.

50. At the same time that it issued its *Phillips* decision the Commission issued its Statement of General Policy No. 61-1, establishing guideline prices for various pricing areas, and shortly thereafter instituted the Permian area rate proceeding.

51. While the Permian Basin Proceedings were pending, the Commission embarked on an individual company-wide

11. The total refunds required for the period ending December 31, 1969, would be approximately 47 million dollars. The excess amounts collected, and not required to be refunded, would total about 5 million dollars.

settlement program which ultimately resulted in settlement by most of the major gas producers. The rates agreed upon in these settlements were generally consistent with those established by the Statement of General Policy No. 61-1, while the refunds were determined by reference to a cost of service study of the company involved with refunds required of amounts collected in excess of the settlement rates for periods after unit costs equalled unit revenues. As a result of such studies, full refunds were not required except in one instance.[12]

52. Following approval of a number of such major producer settlements, the Commission announced in *Jack W. Grigsby (Operator), et al.*, 32 FPC 529 (1964); that it would extend its settlement program to small producers without recourse to cost data for the computation of refunds, but that 25 percent refunds would be required through 1960, 70 percent for 1961 and 1962 and 100 percent thereafter.

12. Tidewater Oil Co:

Refunds were not required by the following companies prior to the dates shown:

Amerada	July 1, 1960
Atlantic	December 1, 1961
Cities Service Production Co.	July 1, 1960
Gulf	December 1, 1961
Humble	May 1, 1961
Pan American	July 1, 1962
Mobil	December 1, 1962 (except for two rate schedules for which additional refunds were made from 4/1/60 to 12/1/16)
Shell	January 1, 1961
Sohio	September 1, 1961
Sun	January 1, 1961
Texaco	January 1, 1961
Texas Gulf	July 1, 1961

53. Subsequent to the issuance of *Grigsby,* settlements were approved with respect to other major producers which provided for no refunds to be made prior to January 1, 1961 (Sun), December 1, 1961 (Atlantic), and February 1, 1962 (Pan American).

54. Phillips Petroleum Company did not enter into a company-wide settlement, apparently, because Phillips has extensive gathering facilities in the area and the Commission's Statement of General Policy did not contemplate any addition to guideline rates for such activities. *H. F. Sears, et al.,* 31 FPC 585 (1964). Since the proposed settlement and our determinations recognize the validity of gathering charges in this area, and since Phillips did not enter into a settlement agreement, the major share of potential refunds during the years 1960 and 1963, approximating 80 percent of the total, are the responsibility of Phillips.

55. We find the proposed refund provisions to be in the public interest and fair under the foregoing circumstances.

Small Producers

56. The precedents of *Permian* and *Southern Louisiana* are followed, and there is no disagreement by anyone with the settlement proposal in this regard. We agree that this is proper and so find.

Approval of Settlement Proposal

57. Having examined each provision of the proposed settlement upon its merits, we find that the proposal as a whole is in the public interest, and should be made the order of this Commission. It is fair to the consuming public, and will promote certainty and stability and reduce administrative burdens by reduction of contested issues. Adoption of the proposal will contribute to obtaining additional supplies of gas from this crucial area, and contribute to co-

operation in the attempt to deal with the problems of gas supply. For all these reasons, the settlement proposal should be adopted.

Supply and Demand

58. In determining area rates we have been charged by the Court of Appeals for the Fifth Circuit with predicting the probable demand for gas, determining the desired level of supply and attempting to determine a price which will elicit that level of supply. *Southern Louisiana Area Rate Cases, supra.* The court noted that this task was difficult, but said it must nevertheless be attempted by the Commission.

59. All major sources of energy in the United States are currently in short supply. Brown-outs have already occurred in some electric utility distribution areas. Restrictions on gas use have been imposed by distributors in a number of areas and are being considered in others. The stock-pile reserves of coal for electric utilities are below the level considered by the industry to be a safe operating margin. The installation of nuclear power plants has progressed more slowly than was forecast and it now appears that nuclear power will not be able to ease the increasing demand on fossil fuel for many years. Domestic oil reserves are declining. Low-sulphur coal and oil are in short supply. Desulphurization facilities are lagging behind projected demand to meet stringent air pollution standards, destined to grow more stringent in several major urban areas. Pipelines are unable to obtain the desired supplies of natural gas. In 1968, according to the statistics of the AGA, the national findings of natural gas fell below production. This occurred again to a greater degree in 1969, when only about 8.3 trillion cubic feet were added to reserves while production mounted to 20.6 trillion.

60. The actual growth in demand for gas as reported by the Future Requirements Committee (FRC)[13] in September 1969, was 4.2% in 1965, 6.9% in 1966, 6.5% in 1967, and 9.1% in 1968. In September 1969, FRC estimated the growth rate for 1969 as 7.4%, for 1970 as 6.1% and for 1971 as 5.3%. For the 1970-75 period the average annual growth rate was estimated at 4.3% compounded annually, from 1975 to 1980 at 2.8%, from 1980 to 1985 at 2.9% and from 1985 to 1990 at 3.1%. These growth rates were based upon a survey of distributors throughout the country conducted by the FRC. Each distributor was asked to make projections from its own areas based on anticipated population growth and trends in demand based on experience. FRC then compiled all the various predictions to produce its estimates for the future. To obtain production necessary to meet these projected increases would mean that the 20.6 trillion cubic feet production of 1969 would have to increase to about 21.9 trillion in 1970, 23.1 trillion in 1971, and 27.0 trillion in 1975.

61. The FRC figures have customarily been on the conservative side.[14] Virtually all predictions as to energy consumption in the past few years have proven swiftly to be gross underestimates. The Commission Staff Report on National Gas Supply and Demand (September 1969) indicates an average annual growth in demand of about six percent (compounded) since 1964. When projected into the

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13. The Committee consists of 26 members drawn from pipelines (11), distributors (6), producers (4), government (5), plus two *ex officio* members from the University of Denver.

14. It has been noted that the FRC's compilation is based upon data furnished by local distributors. The predictions of local distributors as to expected demands upon them have proved in recent years to be not only too low but very much too low. Independent and industry surveys, and the witnesses who have testified in area rate cases as to the probable demand for gas have unanimously under-estimated the growth in demand, some by 200 percent. The predictions of demand for coal and oil have also been proven to be far short of the reality.

future this average annual growth would result in substantially higher demands than those projected by FRC.

62. The largest single year's addition to natural gas reserves in the United States took place in 1956 when it reached 24.7 trillion cubic feet.[15] This was also a year of the great activity in domestic oil exploration and development, in part engendered by disruption of the supply of foreign oil. In no later year have total reserve additions exceeded 21.1 trillion cubic feet, the level in 1965 and 1967. We may fairly predict then that the production of natural gas which reached 20.6 trillion cubic feet in 1969 will shortly reach a level above that of any past year's additions to reserves. With declining gas reserves and an increasing disparity between demand and available supply, we are confronted with the unpleasant prospect that consumption of natural gas must be curtailed or end use controls imposed unless additional sources of supply can be found or alternative sources of energy developed to meet demand. There is little prospect that alternative energy sources will reduce the demand for gas in the next decade.

63. The evidence shows that the demand for gas has risen beyond all expectations of a few years ago and that it will rise within a few years to a level that will strain or even exceed the capacity of the industry to meet. This will not mean that those presently using gas will find none available. It does mean that some of those who want to begin to use gas will not be able to do so and that some of those who want to sell gas will not be able to get all they want for all their customers. Incremental supplies will be limited.

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15. While reserve additions are extremely inaccurate as a measure of findings in any given year, this maximum figure is almost certainly not too high. In general, statistics as to findings must be averaged over several years to offset the inaccuracies in particular years.

64. The situation in the Hugoton-Anadarko area is tied closely to that of the nation as a whole. This area is centrally located. While the greater part of its gas flows northeasterly to the Upper Midwest it could also be used to supply both the East Coast and the Far West. Pipelines which would normally obtain gas from this area have been compelled to go further afield to the Permian Basin, Southern Louisiana, the Texas Gulf Coast and Other Southwest Areas. The demand upon the Hugoton-Anadarko Area may fairly be considered in terms of the national demand although, if anything, the proportionate demand upon this area would exceed that of the nation as a whole. As the Hugoton-Panhandle Field depletes, new Other Fields must replace it if the flow of gas is to continue at present levels.

65. There is no direct evidence in this proceeding as to what relationship a particular price might have to new gas supplies. Since price is one of the important factors bearing on supply, it is reasonable, therefore, to anticipate greater supplies of gas from an increased level of rates.

New Rate Schedule, Rate Change and Quality Statement

66. In this proceeding the Commission provides for a new and simplified filing procedure. In the past, a producer whose rate was in excess of the applicable area rate was required to make one filing setting forth the reduced rate and a separate filing of a quality statement. In the current area rate proceeding we have provided for a single filing in place of the two formerly required. The form set forth as Appendix D will satisfy the requirements of both compliance filing and the quality statement filing, thus simplifying the administrative process and reducing the volume of paper work of producers and of this Commission. It is our intention that the use of this simplified combined statement will be extended to other areas.

COMPARISON OF PROPOSED SETTLEMENT WELLHEAD RATES WITH INITIAL DECISION, GUIDELINE AND IN-LINE RATES

(All rates at cents per thousand cubic feet at 14.65 psia)

	Proposed Settlement			Initial Decision		Guideline[1]		In-line[2]
	Contracts Before — November 1, 1969 — Hugoton-Panhandle Field	Other Fields	Gas-Well Contracts on or after Nov. 1, 1969 (All Fields)	Hugoton-Panhandle Field Contracts before 1961	Other Fields and Hugoton-Panhandle Field Gas-Well Contracts after 1960	Increase for Contracts before Sept. 28, 1960	Initial Price, Temporary Certificates	
Kansas	12.50¢	17.50¢	19.00¢	11.3¢	16.3¢	11.0¢	16.0¢	—
Oklahoma-Panhandle	13.25	18.50	20.00	11.9	17.1	11.0	17.0	17.0
Oklahoma-Anadarko (except Carter-Knox Field	13.25	18.50	20.00	11.9	17.1	11.0	15.0	15.0
Carter-Knox Field	13.25	18.50	20.00	11.9	17.1	11.0	16.8	—
Texas	13.50	19.00	20.50	12.1	17.50	11.0	17.0	—

1. Guideline rates were established by Statement of General Policy, No. 61-1, September 28, 1960. The Commission there stated that increases in rates up to 11 cents per Mcf would not be suspended. Higher increases would be suspended and thereafter collected subject to refund if the area rates were found to be lower. Temporary certificates would issue at the various rates specified for particular areas or sub-areas, subject to refund if later found to exceed the in-line rates. Guidelines were not ceilings, however; any producer might file for any higher rate permitted by its contract subject to refund if the area rate was found to be lower.

2. In-line prices are the initial rates at which permanent certificates are issued, determined after a hearing. They are not subject to refund unless the Commission so provides in a particular case. *F.P.C. v. Sunray DX Oil Co., et al.*, 391 U.S. 9, 21 (1968). They are not ceilings; after the suspension period any producer may file for any higher rate permitted by its contract, subject to refund (down to the in-line rate) if the area rate is found to be lower. In-line prices are established only for contracts of the particular years for which a determination is made in a given case (for example, 1959-1963 in the Oklahoma-Anadarko sub-area; see *Edwin L. Cox, et al.*, 32 FPC 1301, (1964)).

FURTHER FINDINGS AND ORDER

Upon consideration of the entire record in this proceeding, which includes public notice, public hearing with opportunity for the submission of oral and documentary evidence, for cross-examination and for the submission of rebuttal evidence, initial decision by an examiner, exceptions thereto, and oral argument before the Commission, *the Commission further finds:*

(1) Each of the respondents[16] listed in Appendix A to this decision is, and at the time of all past sales with which we are here concerned was, a "natural-gas company" within the meaning of the Natural Gas Act and is engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption subject to the jurisdiction of this Commission.

(2) Past, present and proposed sales of natural gas to which the order herein applies are subject to the jurisdiction of this Commission.

(3) Rates for all sales of natural gas, subject to the jurisdiction of the Commission by the producers in the Hugoton-Anadarko area that are above the applicable area rates prescribed herein, have not been shown to be just and reasonable or otherwise lawful under the provisions of the Natural Gas Act and should be disallowed, and refunds should be required as hereafter provided.

(4) The just and reasonable rates for past, present and proposed sales of natural gas to which this order applies are the applicable area rates set forth in ordering paragraph (A) below.

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16. Where the term "respondents" is used in the finding and ordering paragraphs hereinafter set forth, it is to be regarded as referring to all named respondents in the Commission orders issued in this case, and to all parties on whose behalf such named respondents have filed FPC gas rate schedules for sales of gas produced in the Hugoton-Anadarko area.

(5) Contracts providing for rates in excess of the applicable just and reasonable rates determined herein are in that respect unjust and unreasonable.

(6) It is necessary and appropriate to carry out the provisions of the Natural Gas Act that the Commission adopt the orders and regulations prescribed herein.

(7) Except as herein granted the exceptions to the initial decision and proposed order should be denied.

The Commission, acting pursuant to Sections 4, 5, and 16 of the Natural Gas Act (52 Stat. 822, as amended, 823, 830; 15 U.S.C. 717c, 717d, 717o) and Sections 553, 556, and 557 of the United States Code (the Administrative Procedure Act, 60 Stat. 238, 239, 241, 242, as codified September 6, 1966 by 80 Stat. 383, 384, 386, 387) *orders:*

(A) Part 154 of the Commission's Regulations Under the Natural Gas Act, Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations (18 CFR 154) is amended by adding a new section 154.106 reading as follows:

Part 154—Rate Schedules and Tariffs

* * * * * *

§154.106 Area rates—Hugoton-Anadarko area.

(a) From and after October 1, 1970, the effective date of Opinion No. 586, Docket No. AR64-1, *et al.*, ...FPC....., and prior to July 1, 1977, no rate or charge made, demanded or received under a rate schedule filed pursuant to this Part for gas produced in the Hugoton-Anadarko area shall exceed the applicable area rate prescribed by this section except in compliance with a specific order of the Commission.

(b) Applicable area rate means the base area rate established in paragraph (c) adjusted to the extent required by paragraphs (d), (e) and (f).

(c) *The Base Area Rates.* The following base area rates per Mcf (at 14.65 psia) are hereby established and

subject to the adjustments provided in paragraphs (d), (e) and (f):

(1) Gas sold under contracts dated prior to November 1, 1969:

(i) For all gas produced in the Panhandle and Hugoton Fields:[17]

(aa) Prior to July 1, 1972:

12.50 cents in Kansas
13.25 cents in Oklahoma
13.50 cents in Texas

(bb) On and after July 1, 1972:

13.50 cents in Kansas
14.25 cents in Oklahoma
14.50 cents in Texas

(ii) For all gas produced from fields or reservoirs other than the Panhandle and Hugoton Fields:

(aa) Prior to July 1, 1972:

17.50 cents in Kansas
18.50 cents in Oklahoma
19.00 cents in Texas

(bb) On or after July 1, 1972:

18.50 cents in Kansas
19.50 cents in Oklahoma
20.00 cents in Texas

(2) Gas sold under contracts dated on or after November 1, 1969.

(i) Gas well gas:

(aa) Prior to July 1, 1972:

19.0 cents in Kansas
20.0 cents in Oklahoma
20.5 cents in Texas

17. The Hugoton fields in Kansas, Oklahoma and Texas are limited to the producing zones of the Chase group in the Permian System. The Panhandle fields in Texas include the Panhandle Lime of the Wichita group, the Herrington zone of the Chase group, the Granite Wash formation of Permian and Pennsylvania Age, and the Red Cave formation overlying the Wichita group.

(bb) On or after July 1, 1972:

20.0 cents in Kansas
21.0 cents in Oklahoma
21.5 cents in Texas

(ii) Casinghead gas:[18]

(aa) Prior to July 1, 1972:

17.5 cents in Kansas
18.5 cents in Oklahoma
19.0 cents in Texas

(bb) On or after July 1, 1972:

18.5 cents in Kansas
19.5 cents in Oklahoma
20.0 cents in Texas

(d) *Quality Standards and Adjustments to the Base Area Rate.*

(1) For gas sold under contracts dated prior to November 1, 1969, quality standards and resulting adjustments to the base area rate shall be in accordance with the provisions of the particular contract with respect to contract rates.[19]

(2) For gas sold under contracts dated on or after November 1, 1969, quality standards and resulting adjustments to the base area rate shall be in accordance with the provisions of the particular contract with respect to contract rates, except:

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18. In the event that it is determined by a final order, no longer subject to judicial review, that casinghead gas in the Southern Louisiana area shall receive the same ceiling price as gas-well gas of comparable vintage, the ceiling prices set out hereunder for gas-well gas produced in the Hugoton-Anadarko area and contracted for on or after November 1, 1969, shall apply to casinghead gas contracted for on or after November 1, 1969, prospectively from the date of such final order in the Southern Louisiana Area Rate Proceeding.

19. For those sales certificated by Opinion 390, 29 FPC 1175, there shall be a Btu adjustment proportionately upward and downward from 1,000 Btu, similar to that provided in (2)(iv) hereof.

(i) *Hydrogen Sulphide*—The gas shall contain not more than one grain of hydrogen sulphide per one hundred cubic feet of gas at 60° F and 14.73 psia (10 gr. per Mcf).

(ii) *Total Sulphur*—The gas shall contain not more than 20 grains of total sulphur per one hundred cubic feet of gas at 60° F and 14.73 psia (200 gr. per Mcf).

(iii) *Carbon Dioxide*—The gas shall contain not more than 3 percent by volume of carbon dioxide.

(iv) Btu Adjustment—For gas with more than 1,000 Btu's per cubic foot, at 60° F and 14.73 psia, upward adjustments shall be made on a proportional basis from a base of 1,000 Btu's. For gas with less than 1,000 Btu's per cubic foot, at 60° F and 14.73 psia, downward adjustments shall be made on a proportional basis from a base of 1,000 Btu's.

(e) *Adjustment for Substantial Off-Lease Gathering.* Where delivery of the gas is made after substantial off-lease gathering by the producer, whether at a plant tail-gate or at a central point, the applicable area rate shall be adjusted upward above the base area rate:

(1) For gas produced in the Panhandle and Hugoton Fields:

(i) Prior to July 1, 1972, 2 cents per Mcf.

(ii) On or after July 1, 1972, 2.5 cents per Mcf.

(2) For gas produced from fields or reservoirs other than the Panhandle or Hugoton Fields, 1 cent per Mcf.

(3) In all instances where deliveries are nominated for the gathering allowance, or claim to the same is otherwise made, that portion of any rate or charge attributable to such gathering allowance, and made effective pursuant to the Order herein, shall be charged and collected subject to refund, with interest at 7 percent per annum, pending the Commission's determination, whether such gathering allowance is, in fact, applicable.

(f) *Adjustments for Tax Changes.* The applicable area rate shall be adjusted upward by 75 percent of the amount of any applicable new state or federal production, severance or similar taxes, effective subsequent to January 29, 1970, and shall be adjusted upward by 75 percent of the amount of any increase in existing state or federal production, severance or similar taxes, subsequent to January 29, 1970, and shall be adjusted downward by 75 percent of the amount of any decrease in existing state or federal production, severance or similar taxes subsequent to January 29, 1970.

(g) The Hugoton-Anadarko area consists of the State of Kansas, Texas Railroad Commission District No. 10, and the Oklahoma counties of Cimarron, Texas, Beaver, Harper, Woodward, Ellis, Woods, Alfalfa, Grant, Major, Garfield, Roger Mills, Dewey, Custer, Blaine, Kingfisher, Canadian, Beckham, Washita, Caddo, and Grady, and that part of Stephens County lying within Township 2 North, Range 4 and 5 West.

(h) Prior to July 1, 1977, any seller seeking to charge rates in excess of the applicable area rate or requesting a change in the applicable area rate must file a petition for waiver or amendment of this section pursuant to Section 1.7(b) of the Commission's Rules of Practice and Procedure (18 CFR 1.7(b)) fully justifying the relief sought in the light of this opinion and order. Prior to July 1, 1977, the seller may not file any rate increase in excess of the applicable area rate herein prescribed unless and until the Commission grants the petition.

(B) *Minimum Rates*

(1) Minimum rates per Mcf for natural gas produced in the Hugoton-Anadarko area are hereby established (at 14.65 psia) as follows:

10.0 cents in Kansas
10.5 cents in Oklahoma
10.75 cents in Texas.

For sales made after substantial off-lease gathering by the producer, or at a plant tailgate, the applicable minimum rate shall be adjusted upward by adding the applicable amount of adjustment provided for substantial off-lease gathering.

(2) All respondents making jurisdictional sales of gas produced within the Hugoton-Anadarko area are hereby authorized to apply for increases to the minimum rates provided in subparagraph (1) hereof. Increases to the established minimum rate will be granted notwithstanding contractual provisions to the contrary which are hereby modified *pro tanto*.

(C) Section 157.40 of the Commission's Regulations under the Natural Gas Act, Subchapter E, Chapter I, Title 18 of the Code of Federal Regulations (18 CFR 157.40) is amended by revising paragraph (d) to read as follows:

§ 157.40 Small producer certificates of public convenience and necessity.

* * * * *

(d) *Availability to small producers operating in the Southern Louisiana and Hugoton-Anadarko areas.* Small Producer Certificates are also available to Small Producers operating in the Southern Louisiana or Hugoton-Anadarko areas with respect to their small producer sales in those areas. Small Producer Certificates will authorize sales at prices no higher than the applicable area rates specified for the Southern Louisiana area in § 154.105 and specified for the Hugoton-Anadarko area in § 154.106. Applications for Small Producer Certificates in either or both areas shall contain the information required in subparagraphs (2), (3) and (4) of § 157.40(b).

(D) The applicable area rate as defined in ordering paragraph (A) above, shall be effective from and after

October 1, 1970, and any amounts collected in excess thereof on or after that date shall be subject to refund plus interest at 7 percent. In addition, with respect to the rates involved in the Section 4(e) proceedings set out in Appendix A, the applicable area rate as defined in paragraph (A) above, shall be effective from the date such Section 4(e) rates were collected subject to refund and all amounts collected under those Section 4(e) rates prior to the effective date of this Opinion in excess of the applicable area rate shall be subject to refund, plus interest at the rate specified in the respective Section 4(e) proceeding, in accordance with the provisions of ordering paragraphs (F) and (G) herein: provided, however, that with respect to such 4(e) dockets no refunds are required below the rate allowed in a final, unconditioned permanent certificate previously granted for such sale; no refunds are required of amounts collected prior to January 1, 1960, and only 70 percent of amounts collected in excess of the applicable rate in 1961 and 1962 is required to be refunded.

(E) On or before November 2, 1970, each respondent shall file a supplement to each applicable rate schedule, effective as of October 1, 1970, reflecting any reductions required to bring any or all of its rates into conformity with the applicable base area rate established by ordering paragraph (A) herein. The timely filing of a completed statement in conformity with Appendix D hereto shall constitute compliance with this paragraph (E).

(F)(1) Each person having on file with this Commission a rate schedule with regard to gas produced or sold within the Hugoton-Anadarko area, or hereafter filing such a rate schedule (including a contract or amendment adding acreage or new reserves) shall, with regard to such rate schedule or amendment, file on or before November 2, 1970,

r within 90 days from the date of first delivery under the
ate schedule or amendment, whichever is later, a statement
conformity with Appendix D hereto. All statements
erein required shall be signed by both the seller and the
urchaser. If the seller and the purchaser are unable to
gree upon any or all of the particulars entering into the
mputation of the applicable area rate, the seller shall
e the statement herein required which shall indicate the
bsence of agreement and supply the information required
compute the applicable area rate as well as the con-
ntions of the parties with respect to the quality and
nount of the adjustment for any item in dispute. The
urchaser may file a separate statement setting forth
s views within the period herein provided.

(2) The statement filed hereunder which reflects full
greement between seller and purchaser shall be deemed
ccepted by the Commission unless the Commission, within
0 days after such filing, shall otherwise order. In the
ent of disagreement between the seller and purchaser or,
here the Commission otherwise determines that the state-
ent filed is inconsistent with the provisions of ordering
aragraph (A) herein, the Commission will after appropri-
e proceedings, prescribe the applicable area rate to be
plied as of October 1, 1970.

(3) Any respondent will be exempt from filing the state-
ent required by subparagraph (1) hereof for any sales
hich are "small producer sales" as defined in Section
7.40 with respect to sales in the Hugoton-Anadarko area
accordance with Section 157.40(d) prescribed herein if
producer seeks to qualify thereunder. If the Commission
bsequently finds that such a producer does not qualify
a small producer such applicant shall be required to file
e statement required by subparagraph (1) hereof within
days after any such Commission finding.

(G) *Refund Reports.* On or before November 2, 1970, a refund report shall be filed with this Commission in triplicate, and one copy served on the buyer, by each respondent involved in one or more of the Section 4(e) proceedings set out in Appendix A to this decision and as to which refunds are required under the terms of this decision. Within 20 days from the filing of the refund report the buyer shall file its written concurrence or disagreement with such report. The report shall set forth the following information (if more than one rate schedule is involved the respondent shall supply the information for each schedule separately):

(i) The rate collected during the period subject to refund and the periods during which each rate was collected.

(ii) The volume of gas sold at each such rate.

(iii) The difference between the total amount collected during the period subject to refund and the amount that would have been collected at the applicable area rate as defined herein subject to the provisos of ordering paragraph (D).

(iv) The computation of the applicable area rate and the basis for any difference between it and the base area rate.

(v) The interest, at rates as specified in each Section 4(e) proceeding, on the above refundable excess revenues, subject to the limitation by Section 154.102(f) of the Commission's Regulations Under the Natural Gas Act. The interest shall be calculated to September 1, 1970.

(H) *Treatment of Refunds.* Each respondent shall retain the amounts shown in the report required under ordering paragraph (G) subject to further order of the Commission directing the disposition of those amounts. If a respondent elects to commingle these retained refunds with

its general assets and use them for its corporate purposes, it is authorized so to do after notice to the Commission; and it shall pay interest thereon at the rate of 8 percent per annum on all funds thus available from the effective date of this order to the date on which they are paid over to the person ultimately determined to be entitled thereto in a final order of the Commission. If a respondent elects to deposit the retained refunds in a special escrow account, the respondent shall make such deposit and shall tender for filing on or before the date of the filing of the refund report an executed Escrow Agreement, or a certificate attesting to the fact that it has executed such an agreement, in the form provided by Section 250.12 of Part 250 of the Regulations Under the Natural Gas Act (18 CFR Part 250).

(I) These proceedings shall remain open for such further action as may be necessary with respect to individual respondents and such other action as may be necessary in the premises.

(J) Except as herein granted the exceptions to the initial decision and proposed order are hereby denied.

(K) The effective date of this order is October 1, 1970.

(L) Twenty-five copies of any application for rehearing or petitions for reconsideration shall be filed with the Commission in addition to the copies served on the parties to this proceeding.

(M) The Secretary shall cause prompt publication of the findings and ordering paragraphs, together with notice of the availability of this entire Opinion, to be made in the Federal Register.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Acting Secretary.

APPENDIX B

Excerpt from pages 10 and 11 of Opinion No. 565-A

THE REFUND

22. In our original opinion and order of August 6, 1969, we provided for a refund based on the in line price of 20 cents for deliveries from the commencement of operations in the Rayne Field until October 1, 1968. For the period from this date until the time of payment the refund was to be based on the Southern Louisiana area rate of 18.5 cents per Mcf for 1959 vintage gas.

23. At the present time the question of a refund must be approached in the light of the present state of area price regulation in the Southern Louisiana area. On review of our *Southern Louisiana* area decision, Opinion No. 546 and order in AR61-2, the court indicated[3] that we had authority under Section 16 of the Natural Gas Act to stay, modify or rescind any part of our order, notwithstanding the court's affirmance, if circumstances made a change advisable. The court on rehearing confirmed our authority to reopen any part of the *Southern Louisiana* orders, including those affecting revenues from gas already delivered, and to make retrospective as well as prospective adjustments in the public interest. The court specifically said that the Commission might let its refund orders stand, or, if it found the refunds too burdensome, might remedy the situation by changing its orders.

24. The court refused to stay issuance of its mandate affirming our rate determinations in Opinion No. 546, and the judgment was issued as the mandate on July 14, 1970. However, as noted above, we have stayed any rate reductions or refunds required to be made in Opinion No. 546 and order.

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3. *Southern Louisiana Area Rate Cases, supra.*

25. The result is that the just and reasonable rates applicable to the Southern Louisiana area in which the Rayne Field is situated have not been fully determined, nor has it been determined whether refunds should be made by the producers in that area either for the periods before or after October 1, 1968. In these circumstances it is our opinion that the public interest precludes our ordering refunds to be paid by the Rayne Field producers at this time. The myriad problems confronting the Commission in coping with producer regulation render our task difficult and complex, at best. However, the one objective that must always be kept in sight is the need to provide fair and equal treatment for all of those regulated. It is essential, therefore, that the four producers involved in this proceeding should be afforded the same treatment as will be given to all other producers in Southern Louisiana. In this regard, we believe that the just and reasonable rates which ultimately flow out of any settlement, or further proceedings in AR61-2, or AR69-1, should govern the level of payments in this case prior to October 1, 1968, as well as after that date. While we may find ultimately that refunds should be paid, we need not discuss here the contentions made by Continental with respect to the appropriateness of refunds or their computation (assuming a firm Southern Louisiana area rate).

SUPREME COURT, U. S.

FILED
OCT 14 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680, 681, 682, 683,
684, 685, 691 and 692

MUNICIPAL DISTRIBUTOR GROUP, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, ET AL., *Respondents.*

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENT, PIPELINE PURCHASER GROUP

(Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe Line Corporation, Trunkline Gas Company, United Fuel Gas Company, United Gas Pipe Line Company)

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October 14, 1970

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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On Petitions for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENT PIPELINE PURCHASER GROUP

Respondent Pipeline Purchaser Group[1] opposes the petitions for writ of certiorari in the above-captioned nine causes, all of which relate to the judgment of

[1] The Pipeline Purchaser Group sought judicial review below but is solely a respondent here. The group consists of eight interstate pipeline purchasers, Southern Natural Gas Company, Tennessee Gas Pipeline Company, Texas Gas Transmission Corporation, Texas Eastern Transmission Corporation, Transcontinental Gas Pipe-Line Corporation, Trunkline Gas Company, United Fuel Gas Company, and United Gas Pipe Line Company.

the United States Court of Appeals for the Fifth Circuit entered on March 19, 1970, because under present circumstances the petitions are premature.

OPINIONS BELOW

The opinion of the Court of Appeals dated March 19, 1970, and its opinion on petitions for rehearing dated June 16, 1970, are not yet reported but have been printed as appendices to Continental Oil Company's petition in No. 680, Appendix A, pages 1-70 and Appendix B, pages 1-3, respectively. The opinions and orders of the Federal Power Commission are reported at 40 FPC 530, and 41 FPC 301, respectively.

JURISDICTION

Petitioners have sought to invoke the jurisdiction of this Court under 28 U.S.C. 1254(1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

In light of the opinions and judgment below, and the active status of related proceedings being heard by the Federal Power Commission ("Commission") in Docket Nos. AR 69-1, *et al.*, the Pipeline Purchaser Group believes all petitions for writs of certiorari in this case to be premature. Therefore, in our view the question actually presented is:

> Whether it is premature for this Court to review at this time procedural and substantive matters raised by petitioners, since the court below preserved to the Commission the responsibility for determining, in the first instance, the manner in which the recently recognized shortage of natural gas should be treated in prescribing producer rates—an undertaking the Commission is vigorously pursuing in proceedings which have not yet been concluded.

STATEMENT OF THE CASE

Although the petitions adequately describe the general history of the case, they do not focus sharply upon the problem with which the court below, and even more directly the Commission, was confronted.

This proceeding, the second initiated by the Commission under its program to regulate the rates of independent producers of natural gas through area ratemaking, commenced in May, 1961. At that time, and throughout the evidentiary stages of this proceeding, natural gas supplies from the Southern Louisiana area were adequate to meet consumer requirements, although the margin of safety was progressively narrowing.

By the time the Commission issued its decision, Opinion No. 546, on September 25, 1968, the shortage had reached the point at which interstate pipeline purchasers were unable to purchase currently the supplies of gas needed to meet their growing market requirements. Accordingly, when Opinion No. 546 was issued, the Pipeline Purchaser Group filed with the Commission a motion requesting the opportunity to bring to its attention tangible facts as to the gas supply problem, certain in the knowledge that the situation would deteriorate sharply unless the Commission took remedial steps through modification of the recently issued rate order. (R. 398858). Other parties made similar requests.

Although the Commission did not then apprehend the extent to which the gas supply shortage had overtaken the industry, and so did not reopen the proceeding for evidence as to this critical problem, it sought to resolve the issue by initiating another area rate

proceeding for Southern Louisiana, on the same day it denied rehearing in the instant proceeding. The new area rate proceeding, Docket No. AR 69-1, has been moving forward on an accelerated basis throughout the period the instant matter has been under judicial review.

Also, the Commission did not make effective the rate levels provided in its order in the instant proceeding, nor require the payment of refunds based upon such rate levels. In part, this is the result of stay orders issued by the Commission and the court below, and in part it is attributable to the fact that the Commission has not deemed it timely to order such actions.

As the hearings in the new area rate proceeding were commencing, the Commission enlarged the subject matter, initially relating only to offshore regions of the Southern Louisiana area, so as to embrace the onshore regions as well. Thus, the Docket No. AR 69-1 proceeding applies to the entire Southern Louisiana area, and to all vintages of gas, as well as to the appropriate price level for future discoveries.

The Pipeline Purchaser Group, while actively participating in the Docket No. AR 69-1 proceedings, also petitioned for judicial review in the United States Court of Appeals for the Fifth Circuit, urging that the Commission be directed to relate its Southern Louisiana rate order to the eliciting of adequate gas supplies for consumer needs, in light of current conditions.

Without detailing the steps leading to the judgment of the Court of Appeals, it is sufficient for present purposes to note that the Commission ulti-

mately requested a remand, and the court below undertook to assure petitioners and other parties that the Commission would be free to take such action as it deemed necessary to counteract the gas supply shortage. The Commission is currently attempting to do so with active cooperation of almost all the parties, including those involved in this litigation.

As recognized by the court below, the members of the Pipeline Purchaser Group appear in the instant matter solely in their role of purchasers and transporters of Southern Louisiana gas, and their alignment results from the fact that "they are concerned that the price level will not elicit sufficient supply for their needs" (Continental Appendix A, page 2). This is true with respect to this Brief in Opposition as well.

We urge the Court to permit the Commission to proceed as rapidly as possible to resolve the entire pricing problem for the Southern Louisiana area so as to ameliorate what has become a critical gas shortage of nation-wide proportions. This objective can be attained most directly and expeditiously through denial of the petitions for writs of certiorari as prematurely brought.

ARGUMENT

I.

In Its Present Posture, Supreme Court Review of the Judgment Below Would Be Premature

The petitions for writs of certiorari variously seek to question (1) the ratemaking formulae applied by the Commission, some contending that the resultant rates were too low (Nos. 680, 681, 683, 684, 685), and another petitioner contending that they were too high (No. 692); or (2) the procedure employed by the court

below for the purpose of enabling the Commission to implement its rate order if it saw fit while preserving the Commission's authority to modify the order if needed (Nos. 669, 691). Petitioner in No. 692 seeks further review as to both aspects. Finally, the major producer group, Texaco, *et al.*, has conditionally cross-petitioned in No. 681, recognizing prematurity but seeking the right to raise substantive issues in the event certiorari should be granted as to other petitions.

In our view, because of the particular circumstances involved, this case in its present posture presents no issue which is ripe for review. Until the Commission takes further action, which would of necessity be subject to appellate review, no party can be finally affected by the judgment below. And, until the Commission acts, no party can foretell which issues, if any, will ultimately be relevant.

Thus, although it is understandable that parties wish to protect their future positions, or even to obtain judicial sanction for those positions, neither of these objectives calls for affirmative action by the Court at this time.

What is required, we submit, is that the Commission be permitted to take such action as *it* finds to be appropriate in meeting the natural gas shortage in this all-important producing region, and to do so as soon as physically possible. This is so clearly required—and so patently an administrative function—that judicial intervention at this point is neither necessary nor appropriate. It will be time enough to review the court's procedural determination as well as the Commission's substantive ratemaking formulae when an administrative order has been entered dealing comprehensively with all these matters.

As noted above, the Commission instituted a new area rate proceeding in Docket No. AR 69-1 on March 20, 1969, the same day that it denied rehearing in the instant cause. Although initially limited to more recent vintages of gas from the offshore region of Southern Louisiana, the scope of the proceeding was enlarged on December 15, 1969, to embrace *all* vintages of gas from *all* regions of Southern Louisiana.

That proceeding, which none of the petitioners has sought to abort, is presently in a very advanced evidentiary hearing stage and settlement negotiations are progressing concurrently. Since one of the principal objectives of the proceeding is to come to grips with the economic aspects of the current gas shortage, there is every reason to allow that proceeding to be concluded, and no substantial reason to destroy it through piecemeal review of various portions of its subject matter.

The petitions in Nos. 669, 691 and 692 set forth various allegations regarding the impact of the judgment below as to potential refunds, but the facts are that the Commission has never entered an order requiring the payment of refunds in this proceeding. Nor does the court's action in any way preclude ultimate refunds. Contrary to the views expressed in those petitions, the principal issue below related to the rate levels which should have been prescribed—but both the Commission and the Court of Appeals have been at pains to maintain maximum flexibility for the ultimate determination of those rate levels by the Commission.

Since there is no reason to believe that the Commission will shirk its responsibility, and on the con-

trary, there is every indication that it is seeking to arrive at a fair and efficacious solution to a very complex problem, it clearly should not now be hampered or foreclosed.

Finally, with regard to the procedural matters, it is not at all clear that the court's reference to the Commission's freedom to make "retrospective as well as prospective adjustments in this case" would sanction "reparations" or "retroactive ratemaking" as some petitioners suggest. In the first place, as explained above, the Commission's original rate order was never implemented, so this is not an instance of rates having been made effective and later changed, *nunc pro tunc*. Moreover, since the Commission has not taken definitive action in this regard, there is no basis for contending that it has acted unlawfully.

If, in fact, the consequence of the judgment below, or the Commission's action in pending proceedings, were to result in "reparations" or "retroactive ratemaking", the Pipeline Purchaser Group would urge that certiorari be granted and the decision of the court below summarily reversed with directions to remand to the Commission for full reconsideration in light of the critical gas shortage. But, in our opinion, nothing of this nature has occurred.

Thus, both as to the substantive aspects and the procedural questions, the petitions for writs of certiorari present no issue which must, or should be, resolved at this time. The entire subject matter should remain, or be placed, in the hands of the Commission for a definitive determination at the earliest possible time.

CONCLUSION

Wherefore, for the foregoing reasons, the Pipeline Purchaser Group requests that all petitioners for writs of certiorari in these proceedings be denied.

Respectfully submitted,

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Attorney for Respondent,
Pipeline Purchaser Group

October 14, 1970

SUPREME COURT, U. S.

Nos. 669, 691, and 692

Supreme Court, U.S.
FILED
OCT 14 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 669

MUNICIPAL DISTRIBUTOR GROUP,
Petitioner,

v.

FEDERAL POWER COMMISSION, *et al.*,
Respondents.

No. 691

ASSOCIATED GAS DISTRIBUTORS,
Petitioners,

v.

AUSTRAL OIL COMPANY, *et al.*,
Respondents.

No. 692

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

AMERADA HESS CORPORATION, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MEMORANDUM FOR RESPONDENTS CONTINENTAL OIL COMPANY, *ET AL.*

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October 14, 1970

WILSON - EPES PRINTING CO. - RE 7-6002 - WASHINGTON, D. C. 20001

IN THE

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OCTOBER TERM, 1970

No. 669

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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

MEMORANDUM FOR RESPONDENTS CONTINENTAL OIL COMPANY, *ET AL.*

Continental Oil Company and Mobil Oil Corporation (Continental, *et al.*), petitioners in No. 680, hereby re-

spond to the petitions in Nos. 669, 691 and 692 which also seek writs of certiorari to review the judgment and opinions entered by the United States Court of Appeals for the Fifth Circuit in this same case on March 19, 1970 and June 16, 1970. In response to these petitions, Continental, *et al.*, state:

1. In Nos. 669, 691, and 692, Texaco, Inc., *et al.*, are filing a brief opposing the petitions in Nos. 669, 691, and 692. Continental, *et al.*, do not oppose the petitions in Nos. 669, 691, and 692 on the grounds of prematurity set forth at pages 7-11 of the Brief for Texaco, *et al.*, but adopt the other grounds for opposing the petitions set forth at pages 12-19 of the Brief for Texaco, *et al.*

2. In the event the petitions in Nos. 669, 691, and 692 are granted, Continental, *et al.*, will not be aligned with the petitioners. In No. 680, Continental, *et al.*, have set forth the questions Continental, *et al.*, believe are presented by the opinions and judgment below, and our view that the Court of Appeals erred in refusing to reverse the Commission on the issues raised by Continental, *et al.*, and remand the case with express directions to the Federal Power Commission to rescind the opinions and orders on review. Therefore, in the event this Court considers the case on the merits, the position of Continental, *et al.*, will be that indicated by the petition in No. 680.

3. In the event the petitions in Nos. 669 and all related cases were granted, Continental, *et al.*, also would not oppose the request of Petitioner The California Company in the related case No. 682 that the case be "summarily remanded to the Court below with instructions to

direct the Commission to reopen the case and proceed to such orders as it deems in the public interest."

Respectfully submitted,

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October 14, 1970

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In the Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680–685, 691, 692

SOUTHERN LOUISIANA AREA RATE CASES

MUNICIPAL DISTRIBUTOR GROUP, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The initial opinion of the court of appeals (Cont. App. A, pp. 1–70)[1] is reported at 428 F. 2d 407. Its opinion on petitions for rehearing (Cont. App. B, pp. 1–3) is not yet reported. The opinions (No. 546) of the Federal Power Commission (Cont. App. D, pp. 1–258) are reported at 40 F.P.C. 530. The Commission's opinion (No. 546–A) on rehearing (Cont. App. E, pp. 1–112) is reported at 41 F.P.C. 301. (Opinions 546 and 546–A are hereinafter referred to as "*Southern Louisi-*

[1] "Cont." references are to the separate appendix to the petition filed by Continental Oil Company in No. 680.

ana I"). The decision of the Hearing Examiner (III J.A. 62d–447d) is reported at 40 F.P.C. 703.

JURISDICTION

The judgment of the court of appeals (Cont. App. C) was entered on March 19, 1970, and was clarified by opinion and order on timely petitions for rehearing on June 16, 1970 (Cont. App. B, pp. 1–3). The present petitions were filed on September 9 and 14, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b).

QUESTION PRESENTED

Whether a reviewing court acting pursuant to Section 19(b) of the Natural Gas Act may affirm a Commission rate order with the condition that the Commission may modify that order if it determines, on the basis of new evidence appearing since the close of the initial Commission proceedings, that the public interest requires a modification.

STATEMENT

These petitions involve the Commission's second decision regulating producer rates on an area basis. The area here is Southern Louisiana, which is defined as that portion of the state lying south of the 31st parallel, including state and federal areas in the Gulf of Mexico off the Louisiana coast (Cont. App. D, p. 6), and which covers about 54,000 square miles with similar geological characteristics, almost equally divided between land and offshore waters (Cont. App.

D, p. 10). *Southern Louisiana I* was initiated in May, 1961 (25 F.P.C. 942). The Commission issued Opinion No. 546 on September 25, 1968, and Opinion No. 546–A on rehearing on March 20, 1969.

A. Background

The Commission assumed jurisdiction over the wellhead sales of natural gas sixteen years ago pursuant to this Court's opinion in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672. For approximately six years, the Commission struggled to apply the theory of public utility regulation to an industry whose risks, investments, and operations could not be compared to a pipeline, an electric utility, or any other utility with facilities dedicated to the public use. The Commission's initial effort to regulate the price for each of the nearly 2,425 producers selling in interstate commerce in 1960 on a company-by-company cost basis brought the regulatory process to a standstill. Therefore, in 1960 the Commission announced proceedings to regulate producers on an area basis. Under this methodology, an individual producer's actual costs would be immaterial in determining his rates. Instead, a ceiling price per unit of gas would be allowed uniformly to all producers in an area. While the area rate proceedings were being developed, litigation and Commission policy statements established interim ceiling prices under which permanent certificates would be granted pending the outcome of the area rate cases;

these rates were called "in-line" and "guideline" rates.[2]

For five years the Commission struggled with its first area rate proceeding, finally issuing an opinion and order in 1965 establishing area rates for the Permian Basin. *Permian Basin Area Proceeding*, 34 F.P.C. 159, 1068, 1286. The Commission's regulatory procedures there were affirmed by this Court as being constitutionally permissible and not an abuse of the Commission's powers under the Natural Gas Act. *Permian Basin Area Rate Cases*, 390 U.S. 747. Emphasizing that "area regulation of producer prices is avowedly still experimental in its terms and uncertain in its ultimate consequences" (390 U.S. at 772), this Court recognized that the *Permian* case was "the first of many steps toward a more expeditious and effective system of regulation" (390 U.S. at 772, n. 37) and called upon the Commission to "continue to examine both the premises of its regulatory methods and the consequences for the industry's future of its rate-making orders" (390 U.S. at 816, n. 99).

Only five months after this Court's *Permian* decision, the Commission handed down its initial decision in *Southern Louisiana I*—the second area rate case—which had been pending before the Commission since 1961.

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[2] See *e.g.*, *Federal Power Commission* v. *Sunray DX Oil Co.*, 391 U.S. 9; *United Gas Improvement Co.* v. *Callery Properties*, 382 U.S. 223.

B. *Southern Louisiana I and Subsequent Commission Proceedings*

In *Southern Louisiana I,* the Commission adhered to the multiple-price system adopted in *Permian* in establishing rates for the sale of natural gas to interstate pipelines (Cont. App. D, pp. 20–22). Natural gas which is not produced in association with oil production and which is being produced under contracts dated prior to January 1, 1961 was denominated "flowing gas-well gas" (Cont. App. D, p. 28). Nonassociated gas produced under contracts dated subsequent to January 1, 1961 was termed "new gas-well gas" (Cont. App. D, p. 28). Generally, higher ceiling prices were permitted for the sale of new gas-well gas (Cont. App. D, p. 9). Gas produced in association with production of oil, or "casinghead gas," was given the same ceiling prices as flowing gas-well gas without regard to contract date (Cont. App. D, p. 9). The ceiling rates permitted for the sale of each were based primarily on costs (Cont. App. D, pp. 21–22).

The costs for flowing gas-well gas were developed in Southern Louisiana on an historical basis and primarily reflect expenditures for exploration and development in 1960, operating expenses in 1960, and investments which were made by producers through 1960 (Cont. App. D, pp. 85, 91, 248–49). Allocations were made by the Commission with respect to many costs and capital investments which producers incurred in the joint effort to discover and produce either oil or gas (Cont. App. D, pp. 88–93; 96–103).

A return at the rate of 12 percent was allowed on the industry-wide net book investment as of year-end 1960 (Cont. App. D, p. 104). Except for exploration and development expenditures, flowing gas costs were determined on an area basis per thousand cubic feet (Mcf) of gas produced (Cont. App. D, pp. 85, 249–50).

The cost of new gas-well gas was determined on a nationwide basis per Mcf of reserves added (Cont. App. D, p. 33). Unit costs were determined by taking the average annual expenditures for each component of cost and relating those expenditures to the average annual volume of non-associated gas reserves added or, in the case of operating expense, to the annual production volume (See Cont. App. D, pp. 31, 33). Unsuccessful exploration and development expenses, such as dry holes, were allocated between oil and gas; other allocations were also required between oil and gas (See Cont. App. D, pp. 36–37, 88–89). The applicable rate of return was applied to a rate base representing industry-wide investments spread over a 20-year recovery period and also taking into account an average lag of a year between the investment of funds in the search for gas reserves and the commencement of revenue from the sale of reserves discovered as a result of that search (Cont. App. D, p. 50). Natural gas liquids are usually found in conjunction with non-associated gas. Total finding and production costs for non-associated gas were reduced by the net market value per Mcf of such liquids (Cont. App. D, pp. 42–45). Although the Commission at the time of its 1968 decision recognized the

availability of later cost data, it did not actually employ such later data in the new gas cost calculations (Cont. App. D, pp. 36–40; 47–48). Instead, the costs were based primarily on data applicable to the period prior to 1961, although data as recent as 1966 were considered by the Commission (Cont. App. D, p. 39).

Having determined the costs involved, the Commission established three "vintages" of gas with separate ceiling prices for each (Cont. App. D, pp. 174–175). The first vintage included flowing gas-well gas and all casinghead gas; as to this the Commission fixed a maximum price of 17 cents per Mcf (Cont. App. D, pp. 175, 179).[3] New gas-well gas sold under contracts dated between January 1, 1961 and October 1, 1968 (second vintage) was given a ceiling price of 18 cents per Mcf (*Id.*). The third vintage was for new gas-well gas produced under contracts dated on or after October 1, 1968, on which an extra .5 cents would be allowed "to encourage continuation of necessary exploration and development activities and to recognize the greater uncertainties and possibilities of fluctuation [with respect to unit costs] to which the sellers are exposed" (Cont. App. D, p. 175). Accordingly, the ceiling price for third vintage gas was set at 18.5 cents (Cont. App. D, pp. 175–179).

An indefinite moratorium was also established prohibiting producers from filing for rate increases above the rates set "until such time as they may be changed by the Commission" (Cont. App. D, pp. 169–73).

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[3] As to each vintage, 1.5 cents per Mcf would be added to the ceiling price of gas subject to the Louisiana production tax.

Any amounts collected above the applicable area rates established in *Southern Louisiana I* after its effective date of October 1, 1968 were to be subject to refund. In addition, with respect to rates which had been collected prior to that date subject to refund under Section 4(e) of the Natural Gas Act, the applicable area rates were to be effective from the date such Section 4(e) rates were collected, with the difference to be refunded. No refunds were required, however, to the extent that the applicable area rates were below rates allowed by a final, unconditioned permanent certificate or a settlement. The amounts of the refunds and their disposition were made subject to further Commission order. (Cont. App. D, pp. 183–88; Cont. App. E, pp. 43–46.)

On March 20, 1969, some six months after its initial decision, the Commission modified its opinion by the issuance on rehearing of Opinion No. 546–A. The moratorium for the third vintage taxed gas was given a termination date of January 1, 1974 (Cont. App. E, pp. 7–8). Moreover, because of the Commission's concurrent decision to institute a new proceeding applicable to the offshore federal domain area, Docket No. AR69–1 (hereinafter "*Southern Louisiana II*"), the Commission determined to permit rate increase filings, subject to suspension and refund, up to 20 cents per Mcf for third vintage gas-well gas in the offshore federal domain (Cal. App. B, pp. 1–8).[4]

[4] "Cal." references are to the separate appendix to the petition filed by The California Company in No. 682.

During the pendency of the instant case before the Fifth Circuit, the Commission on December 15, 1969 expanded *Southern Louisiana II* to include all vintages of gas in Southern Louisiana, both on and offshore, and called upon the parties to provide evidence on "the adequacy of gas supply and adequacy of service to consumers, the demand for gas, the cause of a gas shortage, if any, the effect of price on gas supply and demand, and other relevant economic evidence, together with the current, nationwide cost of finding and producing non-associated gas" (Cal. App. B, pp. 9–15).

On July 17, 1970, the Commission initiated Docket No. R–389A in order to determine, nationwide, "the terms and conditions which will result in an adequate supply of natural gas for consumers at the lowest rate consistent with maintaining an industry structure capable of providing, and motivated to provide, service with its attendant risks." That proceeding encompasses Southern Louisiana but only as to gas produced under contracts dated subsequent to June 17, 1970. 35 Fed. Reg. 11638.

On July 30, 1970, the Commission initiated Docket No. R–394 in order to determine whether to lift the moratorium prohibiting rate increases in Southern Louisiana that had been imposed by *Southern Louisiana I* (Cal. App. B, pp. 39–43). That proceeding remains pending.

The rates set by the Commission in *Southern Louisiana I* have never been ordered into effect.

C. The Court of Appeals Decisions

Petitions to review the Commission's orders in *Southern Louisiana I* were filed in various courts of appeals by producers, pipeline companies, distributors and one state commission and were consolidated in the United States Court of Appeals for the Fifth Circuit. On March 19, 1970, the Fifth Circuit entered its first opinion. After recognizing that the purposes of the Natural Gas Act encompassed maintenance of adequate service for the consumer, the court pointed out that the Commission had declined to estimate either the overall demand for gas or the future supply which its order would elicit, and expressed concern that this was a violation of this Court's directive in *Permian* (Cont. App. A, pp. 46–50). The court nonetheless affirmed the Commission, noting that the Commission had initiated a new proceeding—*Southern Louisiana II*—to consider the possible inadequacy of its orders and was now aware of new information on the supply situation; the court stated that an evaluation of the supply situation and determination of the action needed were for the Commission and not a reviewing court, and that the Commission's orders were procedurally and substantively adequate in light of this Court's decision in *Permian* and the fact that the "experiment" doctrine of *Permian*—giving the Commission substantial leeway to develop procedures for establishing area rates—was still in effect (Cont. App. A, pp. 56–59). Accordingly, the orders of the Commission were "sustained in full" (Cont. App. A, p. 69).

The court did, however, specifically identify improvements it felt the Commission should make in its handling of area rate proceedings. The Commission was called upon, for example, to identify and explain the rate components, to assess the character and number of individual producers that will remain after a rate order has had its effect, to assess the capital actually available to the industry as a whole and to assess the industry's probable conduct and performance as a result of an order. The court further called upon the Commission to make findings as to the market variables of supply and demand, and to set out the supply levels which its orders should elicit (Cont. App. A, pp. 61–68).

In view of these suggested improvements and in view of the Commission's knowledge of the impending natural gas supply crisis, the court acknowledged that the Commission might wish immediately to modify its *Southern Louisiana I* order despite the affirmance (Cont. App. A, p. 59) and cautioned that the affirmance should not be construed to interfere with such modification (Cont. App. A, p. 69).

Certain parties petitioned for rehearing, urging the court to remand the case for the taking of further evidence and to require further findings on the supply issue; they argued that the affirmance would preclude the Commission from modifying the rates for gas already delivered if necessary to deal with the supply problem. To assist in its consideration of those petitions, the court directed two specific questions to the Commission concerning (1) the Commission's au-

thority to stay, modify or rescind an order once that order had been "affirmed" and (2) a reviewing court's equitable powers to "affirm" while preserving Commission authority to "stay, modify or rescind" an order.

In response (Cal. App. B, pp. 51–54) the Commission stated: (1) that it would not have the authority to permit retroactive rate changes after affirmance, unless authorized to do so by the court at the time of the affirmance; and (2) that a reviewing court under Section 19(b) of the Natural Gas Act had

> * * * full statutory power to authorize or to instruct the Commission to (a) reconsider the record before it under standards set by the Court or (b) reopen the record for a specific purpose or purposes and to submit any modifications of the rate order to the same Court for further review in the light of the Court's standards, or both, without necessarily reversing the Commission and vacating the order for a new hearing.
>
> Any equitable powers which would transcend these statutory powers would be determined by this Honorable Court. (Cal. App. B, p. 53).

The Commission's response further requested the court of appeals to clarify whether it "intended to authorize this Commission to make retrospective adjustments, if it deemed appropriate, in the rates set in [*Southern Louisiana I*] *as of the effective date of the Commission* opinions (October, 1968) to the present or whether the court intended, by the use of the words 'sustained in full' * * * to restrict the

Commission to prospective changes from some future date when subsequent Commission orders, if any, are issued lifting the moratoria or establishing a new just and reasonable rate" (Cal. App. B, pp. 53–54). In addition, the Commission requested a remand of the case so that "the Commission can discharge its regulatory responsibilities consistent with the Court's opinion" (Cal. App. B, p. 54). Two of the five members of the Commission did not concur in the request for a remand, one of them stating that a remand "would create a climate which will inhibit a possible settlement in the pending [*Southern Louisiana II*] proceeding which was an outgrowth of the Commission's awareness that the gas supply situation was changing" (Cal. App. B, p. 55).

On June 16, 1970, the Fifth Circuit issued a *per curiam* order expressing its intention, pursuant to its equitable powers, to authorize the Commission to reopen all aspects of its order, including those affecting revenues from gas already delivered. Although emphasizing that its judgment was an affirmance and not a remand, the court left for the Commission's consideration what parts of the orders, if any, should be reopened in light of new evidence and stated that the Commission should have the power and the duty to review and revise its refund orders if this was in the public interest. (Cont. App. B, pp. 1–3).

Following the opinions of the court of appeals, the Commission further stayed any rate reduction pursuant to *Southern Louisiana I* until further order of the Commission (Cal. App. B, p. 31).

ARGUMENT

A.

The issues presented in the various petitions arise in the context of a potential crisis in the adequacy of supplies of natural gas for millions of consumers. Before turning to the specific issues raised by petitioners, it is necessary to understand the seriousness of the crisis and its interrelation with the area rates established by the Commission in *Southern Louisiana I*.

The Commission's staff projects on the basis of current trends, and subject to rebuttal, that by 1973 sufficient gas will not be produced to meet this country's demands unless new reserves are found at an accelerated pace. Although gas produced in Southern Louisiana accounts for approximately one-third of the total volume of gas currently being supplied across the nation,[5] directly affecting consumers in 28 central and eastern states (Cont. App. D, p. 12), Southern Louisiana has accounted for about 63 percent of the nation's total net increase in production since 1964. Production from that area, however, cannot continue to be increased at historical rates under present levels of reserve additions. Thus to a significant extent it appears that the capacity to meet projected national demands for natural gas is dependent upon increased efforts to discover new reserves in Southern Louisiana (*Southern Louisiana II*, transcript pp. 1092–1121; 2938–4169). Accordingly, the Commission must estab-

[5] According to data filed with the Commission by interstate pipelines, the area accounted for 90 percent of the gas sold in the interstate market in 1969.

lish rate levels which provide the necessary capital and incentive to expand the exploration and development of additional reserves in this area.

Evidence concerning the present and future gas supply situation, which was ordered by the Commission on December 15, 1969 (*supra*, pp. 8–9), has been received by the Examiner in *Southern Louisiana II*, has been subjected to rebuttal and cross-examination and will be placed before the Commission within the near future. Since this evidence was not available except through allegation when the Commission decided *Southern Louisiana I*, the rates established by the Commission in that case, which have not yet become effective, necessarily were not based upon a consideration of such evidence. The refunding of approximately $375,000,000 by producers without adequate regard for (1) the effect the rates would have on the adequacy of supply to meet consumer needs, (2) the effect the refunds would have on the ability of producers to provide the capital for exploration and development programs, and (3) the effect on the number of competitors in the search for natural gas, would not be in the public interest. It must be determined whether all or part of the capital represented by the refund dollars is required for exploration and development, before any refund levels are finally determined and ordered. If the Commission were limited to prospective changes of rates in Southern Louisiana, there would be no assurance that immediate capital needs, to the extent they are found to exist, could be fulfilled, since rates for future sales can generate capital only gradually over a period of years.

B.

While it is thus of great practical importance to the public that the Commission be authorized to conduct further proceedings in *Southern Louisiana I*, the legal issue raised by the distributor petitions (Nos. 669 and 691) and the petition of the New York Public Service Commission (No. 692) as to whether the court of appeals acted within its power in authorizing the Commission to conduct such further proceedings is not difficult to resolve. As an analysis of the unanimous decision below and Section 19(b) of the Natural Gas Act demonstrates, the court clearly acted within its powers and there is accordingly no occasion for plenary review of the issue by this Court. The remaining issues presented by the above and other petitions are not substantial and are premature.

1. It is misleading to contend, as do the distributors and the New York Public Service Commission, that the Commission has been granted the power to change rates retroactively. The Commission, of course, has no power to change finally approved rates retroactively and claims none. But where a reviewing court acting pursuant to Section 19(b) of the Natural Gas Act authorizes the Commission to conduct further proceedings with respect to certain rates, those rates are not final and may be revised by the Commission.

The court of appeals, in its initial opinion of March 19, 1970, criticized the Commission for failing, in setting rates for Southern Louisiana, to give adequate consideration to the future natural gas needs of the public. Recognizing that the Commission was undertaking a comprehensive review of the adequacy

of future gas supplies in *Southern Louisiana II*, during which review the Commission might discover that the rates set in *Southern Louisiana I* were inadequate, the court affirmed. The affirmance was qualified, however, and the court cautioned that the opinion should not be interpreted "to interfere with Commission action that would change the rates we have approved here" (Cont. App. A, p. 69). Whatever lack of clarity this qualified affirmance might have had was cured by the court's June 16 opinion on rehearing. The court there expressly relied on its equitable powers and its broad remedial powers under Section 19(b) to authorize the Commission to reopen any part of its orders in *Southern Louisiana I* (Cont. App. B, p. 2), subject, of course, to further judicial review.

In our view, the court acted within the scope of the authority granted to it under Section 19(b) of the Natural Gas Act. That section permits a reviewing court "to affirm, modify or set aside [an] order in whole or in part" and to "order * * * additional evidence to be taken before the Commission." That this provision contains a broad grant of equitable powers has been recognized. *Natural Gas Pipeline Company* v. *Federal Power Commission*, 128 F. 2d 481 (C.A. 7); see also *Ford Motor Co.* v. *National Labor Relations Board*, 305 U.S. 364, 374; *Dolcin Corp.* v. *Federal Trade Commission*, 219 F. 2d 742 (C.A.D.C.), certiorari denied, 348 U.S. 981.

2. The remaining issues raised by the petitions are concerned with specific elements of the methodology adopted by the Commission for the determination of just and reasonable rates for Southern Louisiana. While the court of appeals was critical of certain aspects of the Commission's methodology, it recognized that the regulatory "experiment" referred to by this Court in *Permian* was still in progress and that the Commission should be given latitude to develop and improve criteria for determining rates (Cont. App. A, p. 56–59). The court of appeals was clearly correct in upholding the Commission on these issues, and no matters warranting review by this Court are thus presented.

Finally, consideration of these issues by the Court at this time would be premature and would delay the holding of further proceedings before the Commission.[6] Upon completion of those proceedings, any remaining regulatory issues could be presented to the courts.

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[6] Uncertainty caused by the petitions for writs of certiorari may well inhibit the Commission from expediting its regulatory process in this and related cases to establish stability in rate levels in Southern Louisiana. Only after stable rates are established, at levels which take into account the potential demand for natural gas and the need to discover sources of supply to meet the demand, will the public be protected against the possibility of a critical natural gas shortage. Under present circumstances, there is no assurance that sufficient capital will be available for immediate exploration needs. The Department of the Interior, for example, has given notice that offshore federal lands off Western Louisiana may be made available for lease in the immediate future. 35 Fed. Reg. 8699. Large commitments cannot be expected in the face of uncertain rate levels and uncertain cash refund requirements. Data available to the Commission indicate that these leaseholds are likely to contain large reserves of natural gas.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1970.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 691

ASSOCIATED GAS DISTRIBUTORS, *Petitioners*

v.

AUSTRAL OIL COMPANY, ET AL., *Respondents*

SUPPLEMENTAL BRIEF OF ASSOCIATED GAS DISTRIBUTORS

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November 10, 1970

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Now come the petitioners herein,[1] pursuant to Rule 24 and submit the following supplemental statement.

I.

The filing of this supplemental brief is prompted by an intervening event, namely the filing on November 6,

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[1] A list of the petitioners joining in this Brief is set forth in Appendix A hereto.

1970 with the Federal Power Commission (Commission) of a settlement proposal whereby the issues considered below regarding prices for interstate sales of natural gas by producers in the Southern Louisiana area would be resolved. The settlement proposal now before the Commission is the result of a series of settlement conferences initially convened by the Presiding Examiner in F.P.C. Docket No. AR69-1, the currently pending "second-round" Southern Louisiana Area Rate Proceeding. This settlement has received support from most, but not all, parties and will be considered by the Commission in the near future on completion of the evidentiary record in Docket No. AR69-1.

II.

Since the grant of a writ of certiorari to any party below could result in a substantial and detrimental delay in the Commission's consideration of the pending settlement proposal, Petitioners respectfully submit that the petitions in Nos. 669, 680, 681, 682, 683, 684, 685, 691 and 692 should be denied. If, however, any of these petitions is granted, we ask that our petition likewise be granted.

Respectfully submitted,

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APPENDIX A

Associated Gas Distributors

Alabama Gas Corporation
Atlanta Gas Light Company
The Brooklyn Union Gas Company
Central Hudson Gas and Electric Corporation
Consolidated Edison Company of New York, Inc.
Long Island Lighting Company
New York State Electric & Gas Corporation
Philadelphia Electric Company
Philadelphia Gas Works, Division of UGI Corporation
Piedmont Natural Gas Company, Inc.
Public Service Company of North Carolina
Rochester Gas and Electric Corporation
UGI Corporation
Washington Gas Light Company

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680-685, 691, 692

MUNICIPAL DISTRIBUTOR GROUP, ET AL., *Petitioners,*

v.

FEDERAL POWER COMMISSION, ET AL.

REPLY OF MUNICIPAL DISTRIBUTOR GROUP, PETITIONER IN NO. 669, TO SUPPLEMENTAL STATEMENTS

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The so-called "Settlement Proposal" filed with the Federal Power Commission on November 6, 1970, by the United Distribution Companies,[1] which admittedly[2]

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[1] A number of the distributors comprising the United Distribution Companies are members of natural gas pipeline systems having a stake in higher prices for natural gas production by reason of their important ownership of, and pecuniary interest in, natural gas production properties.

[2] See Supplemental Statement in No. 691 at page 2 and the Commission's Supplemental Memorandum at page 2.

is not supported by all parties to the Southern Louisiana Area Rate Proceedings and has not yet been considered by the Commission, emphasizes, rather than diminishes, the importance of the petition for a writ of certiorari of the Municipal Distributor Group and the necessity for an immediate decision by this Court of the questions presented by that petition, if the primary aim of the Natural Gas Act—protection of gas consumers from exploitation at the hands of natural gas producers and natural gas pipeline companies—is to be realized. *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610.

The "Settlement Proposal" would, if approved by the Commission, retroactively revise the just and reasonable rates prescribed by the Commission in Opinions and Orders No. 546 and 546A, which were affirmed by the court below, and would deprive consumers of the refund of $375 million of charges found by the Commission to be excessive. Supporting the United Distribution Companies' motion for promulgation of the settlement proposal, the Staff of the Commission has just represented to the Commission:

> *J. . .* The resolution of all issues in the Southern Louisiana area necessarily required consideration of Docket Nos. AR 61-2, *et al.* Although the Commission has already issued orders in those proceedings, *the Court of Appeals for the Fifth Circuit has given the Commission authority to reopen any part of its orders that circumstances require be reopened.* (Italics supplied).

And the Commission itself in its Supplemental Memorandum filed in this Court admits (p. 3) that "some of the issues raised here also underly the proposed

settlement", thus putting to rest once and for all the suggestion of prematurity contained in briefs in opposition to the petition for a writ of certiorari of the Municipal Distributor Group.

Moreover, contrary to the contentions of petition in No. 691 (Supp. Statement, p. 2) and of the Commission (Supp. Memo., p. 3), the grant of the Municipal Distributor Group's petition will not impede resolution of producer rate issues. Rather, instability and uncertainty will remain for years if the questions presented by the petition of the Municipal Distributor Group are not decided at this time. For upon approval of the "Settlement Proposal" by the Commission, questions respecting the validity of the retroactive revision of the rates, and denial of refunds to consumers, inherent in the "Settlement Proposal," will be submitted to a United States court of appeals for an appropriate Circuit for review and, thereafter, either on petitions of producers or consumers, will be back before this Court after a delay of a year or more, during which time instability and uncertainty will prevail.

If the petition of the Municipal Distributor Group were premature before, which it was not, it is not premature now, and uncertainty and delay can only be avoided by decision on the questions presented by the petition at this time.

WHEREFORE, for each and all reasons previously stated, the petition of Municipal Distributors Group for a writ of certiorari and its prayer for summary

reversal of the court below on the questions presented in the petition should be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1970

Nos. 669, 680–685, 691, 692

SOUTHERN LOUISIANA AREA RATE CASES

MUNICIPAL DISTRIBUTOR GROUP, ET AL., PETITIONERS

v.

FEDERAL POWER COMMISSION, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE FEDERAL POWER COMMISSION

We file this supplemental memorandum to point out the following events which have occurred since the filing of the Commission's Brief in Opposition to the petitions for writs of certiorari in these cases:

1. On November 6, 1970, the United Distribution Companies [1] filed a proposed resolution on the merits

[1] The United Distribution Companies group consists of 32 distribution utilities serving more than ten million customers in twelve midwestern and eastern states. This group represents over 25 percent of the gas distribution operations in the United States.

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of *Southern Louisiana I* and *II* with the Commission. The proposed resolution was developed at settlement conferences ordered by the presiding examiner in *Southern Louisiana II* (Tr. 1081) and open to all parties to the proceedings. The Commission has given notice of the proposal to all parties to *Southern Louisiana I* and *II* and has directed that any response to the proposal be filed with the Commission by December 11, 1970. The Commission has not yet considered the settlement proposal on the merits and cannot do so until all parties have had an opportunity to be heard.

To date, a substantial number of the parties in the instant cases, as well as the Commission's staff in its role as representative of the public interest, have filed answers in support of the proposed settlement. These supporters include most members of the Associated Gas Distributors,[1] all interstate pipelines purchasing interstate gas in the Southern Louisiana area and producers accounting for more than 70 percent of the interstate sales from that area. Only the New York Public Service Commission, the Municipal Distributor Group,[2] a few members of the Associated Gas Distributors and several producers have not indicated a willingness to support the proposal. They will, following any filing of objections with the Commission, have

[1] The Associated Gas Distributors group consists of gas distribution utilities along the eastern seaboard and its members supply over 11 percent of the gas distributed in the United States.

[2] The Municipal Distributor Group represents a group of distribution utilities supplying less than 2 percent of the gas distributed in the United States.

an opportunity to present evidence in opposition to the proposed resolution on the merits.

2. The Department of the Interior has announced, as anticipated (Commission's Brief in Opposition, pp. 18, n. 6), that an oil and gas lease sale for Offshore Louisiana will take place on December 15, 1970 (35 Fed. Reg. 16417).

In view of these developments and the fact that several of the petitions filed in these cases have now been conditionally withdrawn,[4] we respectfully submit that the remaining petitions for writs of certiorari should be expeditiously denied; since some of the issues raised here also underlie the proposed settlement, any deferral of this Court's consideration would impede the further proceedings before the Commission.

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Solicitor General.

GORDON GOOCH,
General Counsel,
Federal Power Commission.

NOVEMBER 1970.

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[4] We are informed that, as of the date of this filing, only the Municipal Distributor Group (No. 669), the Continental Oil Company and the Mobil Oil Company (petitioners in No. 680), Bradco Properties, Inc. et al. (petitioners in No. 683), the City of Norwich (one of the petitioners in No. 691) and the New York Public Service Commission (No. 692) still desire that their respective petitions for writs of certiorari be granted.

[5] In this regard, it should be noted that the question referred to in the Reply of the New York Public Service Commission in No. 692, pp. 2–7, of where the responsibility lies for the natural gas shortage which the Commission's staff has found to exist is at issue in *Southern Louisiana II*. All parties have had an opportunity to present evidence on that issue during the proceedings before the Commission in that case.

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